Supreme Court, U.S.
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No. 95-___

In The

Supreme Court of the United States

October Term, 1995

PIETRO PARRAVANO, WAYNE HEIKKILA, MARGUERITE DODGIN, EARL CARPENTER, DAVID BITTS, LIZ HENRY, NORMAN L. de VALL, PACIFIC COAST FEDERATION OF FISHERMEN'S ASSOCIATIONS, HUMBOLDT FISHERMEN'S MARKETING ASSOCIATION, CAITO FISHERIES, INC., GOLDEN GATE FISHERMEN'S ASSOCIATION, and SALMON TROLLERS MARKETING ASSOCIATION,

Petitioners,

v.

BRUCE BABBITT, as Secretary of the UNITED STATES DEPARTMENT OF THE INTERIOR, and in his individual capacity; RON BROWN, as Secretary of the UNITED STATES DEPARTMENT OF COMMERCE, and in his individual capacity,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Secretaries of Interior and Commerce may grant to Indian tribes on executive order reservations the same fishing rights as those held by tribes with treaty fishing rights explicitly extending off-reservation, including the "50%" allocation, as defined by this Court in *Washington v. Washington State Commercial Passenger Fishing Vessel Assoc.*, 443 U.S. 658 (1979), where there is no express mention of fishing rights in relevant executive order or statute (an issue acknowledged by the district court as one of "first impression").

2. Whether non-Indian commercial or sports salmon ocean fisheries established since 1978 under Fishery Management Plan for Salmon by the Pacific Management Council pursuant to the Magnuson Fisheries Conservation and Management Act, 16 U.S.C. § 1801, *et seq.*, may be totally closed by the Secretary of Commerce to provide 50% of the Klamath River salmon to reservation Indian fisheries.

3. Whether fishermen named as beneficiaries and participants in federal statute may enforce against Secretary its mandate he "shall . . . formulate, establish and implement a 20-year program to restore" Klamath River salmon, which specifically requires the Secretary to:

> improve and restore Area habitats, and to promote access to blocked Area habitats, . . .
>
> . . .
>
> (iii) improve existing Area hatcheries and rearing ponds . . .

QUESTIONS PRESENTED – Continued

(iv) implement an intensive, short-term stocking program to rebuild run sizes. . . .

(Klamath River Basin Fishery Resources Restoration Act, 16 U.S.C. § 460ss-1(b)(2)(B)(i-iv))[1] where the decline in runs as one consequence of non-performance leads to the closure of these fishermen's ocean fishery.

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[1] Language of the Trinity Basin Act, Pub. L. No. 98-541, 98 Stat. 2721 (1984), is similar.

PARTIES TO THE PROCEEDING BELOW AND RULE 29.1 STATEMENT

There are no parent corporations or subsidiaries to the appellants.

Pacific Coast Federation of Fishermen's Association (hereinafter PCFFA) is a non-profit corporation composed of other commercial fishing associations along the Pacific Coast. Humboldt Fishermen's Marketing Association and Salmon Trollers Marketing Association are two such associations and non-profit corporations. They, like the others making up PCFFA, represent their members, who are commercial salmon fishermen.

Golden Gate Fishermen's Association is a corporation representing members, owners, captains and crew of passenger fishing vessels for salmon sports fishing.

Caito Fisheries, Inc., is a California corporation engaged in salmon and other fish processing.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Pietro Parravano, et al., (hereinafter "Fishermen") respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered on November 16, 1995.

OPINIONS AND ORDER BELOW

The opinion of the court of appeals is reported at 70 F.3d 539 (9th Cir. 1995) and is reproduced in the Appendix ("App.") at 1-18. The opinions of the United States District Court for the Northern District of California are reported at 861 F. Supp. 914 and 837 F. Supp. 1034 and are reprinted at App. 19 to 86.

JURISDICTION

The decision of the court of appeals was entered on November 16, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 § (1).

STATUTES AND ORDINANCES INVOLVED

The case involves the following statutes, relevant portions of which are set out verbatim in the Appendix.

Administrative Procedures Act, 5 U.S.C. § 706

Fishery Management and Conservation Act ("Magnuson Act"), 16 U.S.C. § 1801

Hoopa-Yurok Settlement Act, 25 U.S.C. § 1300i

Klamath River Basin Fishery Resources Restoration Act ("Klamath Act"), 16 U.S.C. § 460ss

Executive Orders of June 23, 1876 and October 16, 1891 (establishing and extending reservation)

The Trinity Basin Act, Pub. L. No. 98-541, 98 Stat. 2721 (1984), has similar language to the Klamath Act and so is not reprinted.

STATEMENT OF THE CASE

Ocean Fisherman,[2] two associations and coastal communities have challenged the closure to salmon fishing of 400 miles of the Pacific Ocean off the coast of Northern California and Oregon. This closure was ordered by agreement of then-new Secretaries of Commerce and Interior in April, 1993 and continues to present.[3]

The basis of the closure was Interior Secretary Babbitt's claim that Indian fisheries within the two reservations on the Klamath River are entitled to 50% of all chinook salmon from that river. This position was months later articulated in a Interior Solicitor opinion, *Fishing Rights of the Yurok and Hoopa Tribes*, M-36975 (October 4, 1993), ER 125-157.

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[2] The women in these associations have opposed the use of the term "fisher," an animal of unsavory habit.

[3] *See* Admission: "Commerce has agreed to manage the Pacific salmon ocean fishery . . . in years subsequent . . . in accordance with [the same] opinion." ER 200.

The Commerce Secretary's agreement meant that ocean fisheries in an area several hundred miles around the mouth of the Klamath would be closed to fishing on all salmon stocks in an effort to provide this 50% Indian share plus spawning escapement. The Secretaries thus granted these Indian tribes on executive order reservations (with no mention of fish) the same rights as tribes of the Northwest with explicit off-reservation treaty fishing rights. (*See Washington v. Washington State Commercial Passenger Fishing Vessel Assoc.*, 443 U.S. 658 (1979) [hereinafter *Fishing Vessel*] on which the Secretaries and Solicitor opinion relied.)

The Fishermen also sought to compel Interior to implement two federal statutes which require the Secretary to take specified steps to restore and enhance salmon stocks of the Klamath (including both environmental and hatchery efforts).[4] Interior was taking salmon from these Fishermen in the ocean to make up to Indians for Interior's failures.

Finally, the "non-Indian" Fishermen challenge the Secretaries' total closure of their fishery while authorizing "Indian fishers" to use net gear in river spawning areas, illegal for non-Indians, as discriminatory. Under this Court's *Adarand Constructors, Inc. v. Pena*, No. 93-1841 (June 12, 1995), neither a silent Executive order nor Interior's own failure to restore the runs provide "compelling interests" to justify this discrimination against Fishermen. (The reverse of discrimination found by this Court in

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[4] Funding has been appropriated by Congress is every year since passage.

Department of Game v. Puyallup Tribe, 414 U.S. 44 (1973): "There is discrimination here because all Indian net fishing is banned and only hook-and-line fishing [by] non-Indians is allowed." 414 U.S. at 415.

The Salmon and the Fishery.

This Court has considered similar fish runs in the past, noting their essential characteristics.

> anadromous fish hatch in fresh water, migrate to the ocean where they are reared and reach mature size and eventually complete their life cycle by returning to the freshwater place of their origin to spawn. Different species have different life cycles, some spending several years and travelling great distances in the ocean before returning to spawn. . . .

Fishing Vessel, 443 U.S. at 662.

This latter is true of the chinook salmon with which this case is concerned. These chinook stay in the Pacific Ocean until their 3- 4- or 5- year, at which time they return to their natal streams and hatcheries along the California and Oregon coast to spawn and die.

As they mature and return toward spawning grounds, chinook have historically been harvested in the ocean by sports and commercial fisheries conducted by fishermen such as Petitioners. As a matter of long-standing state law, they fish only with hook and line.[5]

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[5] The Ninth Circuit reference to "Pacific trolling nets," Slip Op. at 18, was erroneous and does not appear in the Reporter.

This salmon fishery is of great significance not just to Fishermen but also to coastal ports and communities. Fish, and salmon in particular, provide direct benefits through ex-vessel sales and processing as well as attracting tourism and other related economic benefits.

With passage of the Magnuson Fishery Conservation and Management Act (hereinafter Magnuson Act) in 1976, the United States implemented a national policy of eliminating foreign fisheries from an "Exclusive Economic Zone" (hereinafter EEZ) extending "200 nautical miles from the baseline from which the territorial sea is measured." (16 U.S.C. § 1811.) One avowed purpose was to promote domestic commercial and recreational fishing which were held to "constitute a major source of employment and contribute to the economy of the Nation." (18 U.S.C. § 1801(c).)

The area of the contested ocean fishery closure was approximately 400 miles in length along the northern California and southern Oregon coast and extended out to sea the 200 miles of the EEZ.

The ports and coastal communities most devastated included those in the embargoed area: Coos Bay, Bandon, Port Orford, Gold Beach and Brookings in Oregon and Crescent City, Eureka, Trinidad, Humboldt Bay, Shelter Cove and Fort Bragg in California. Other communities and ports outside but near the embargoed zone were lesser affected.

Klamath River chinook, including those from the two state hatcheries, are not a majority of the chinook caught in this area. Cumulatively greater numbers come from many coastal streams (and state hatcheries) including

Oregon's Rogue River, Umpqua River, and other streams to the south. California also has other streams and hatcheries in the area that contribute these chinook to ocean fisheries including the Smith, Little, Mad, Eel and Mattole rivers, and Redwood Creek (documented in the Pacific Management Council's PreSeason Report, Ad. Rec.[6] Vol. II, 8 p. II-13-15). Ocean Fisheries on these runs were all lost.

The vast majority of chinook usually caught in the embargoed zone of the Pacific Ocean are from these sources (and some from distant rivers). The court below projected losses of 89,000 chinook to produce 1,100 additional Indian harvest:

> [A]s plaintiffs emphasize, and the Secretary acknowledges, his regulation will result in a loss of 89,000 catch for ocean fisheries, which will have significant economic consequences (but) will also preserve 3000[7] more Klamath chinook for future spawning and increase the Indians in-river share by 1100.

Parravano v. Babbitt, 837 F. Supp. at 1045, App. at 75.)

Upon return to the Klamath River to spawn, the Klamath Chinook are harvested by an Indian[8] in-river net

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[6] References to the six volumes of Administrative Record (Adm. R.) below are to Volume, document number, then page.

[7] The projected spawning increase was disputed since federal Indian regulations were not vigorously enforced. By the circuit court hearing, it was admitted the spawning was not achieved.

[8] "Indians" includes persons who were not members of tribes. 25 C.F.R. 250.5. A newspaper notice required tribal

fishery conducted within the boundaries of what is now the Hoopa and Yurok reservations (considered by this Court in *Mattz v. Arnett*, 412 U.S. 481 (1973), before its partitioning by the Hoopa-Yurok Settlement Act (hereinafter HYSA), App. 112-117). Those fisheries, conducted pursuant to federal and tribal programs, are for subsistence and commercial purposes. Interior also allows a fishery by Karuk Indians further upriver. It is not part of the 50%. (*See, Karuk Tribe v. United States*, 28 Fed. Cl. 694 (1993) at 697, Karuks claim "hunting, gathering, fishing and other unenumerated rights.")

There is also a small sports fishery in the Klamath River under state jurisdiction. This is a hook-and-line fishery.

Background and History of These Reservations.[9]

Northern California "was a part of the public domain that was transferred by Mexico to the United States in the year 1848 by the Treaty of Guadalupe Hidalgo." *Donnelly v. United States*, 228 U.S. 243, 259 (1913).[10]

California was "admitted into the Union on an equal footing with the original states in all respects whatever" by the Act of September 9, 1850 (9 Stat. 452, c 50).

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membership but the regulation was not amended. *See* 861 F. Supp. 926, App. 43.

[9] *See, also, Mattz v. Arnett*, 412 U.S. 481 (1973).

[10] The portion of that decision suggesting the Klamath River was not navigable was withdrawn by this Court, 228 U.S. 708 (1913).

A treaty was proposed with these Indians in 1864 by Austin Wiley, Superintendent of Indian Affairs, but neither executed nor ratified. *Short v. United States*, 202 Ct. Cl. 870 (1973). As proposed, this included "hunting grounds" but had no mention of "fishing." 202 Ct. Cl. at 893-94.

"The Hoopa Valley Reservation was located (around the Trinity confluence) August 21, 1864, but formally set apart for Indian purposes, . . . only by Executive Order, dated June 23, 1876. Kappler p. 815." *Mattz*, 412 U.S. at 490, n. 9.

The downriver areas along the Klamath extending to the Pacific Ocean and a connecting strip were added to the Hoopa Reservation by Executive order of October 16, 1891. In *Mattz*, this Court noted "the reservation's existence, pursuant to the Executive Order of 1891." *Mattz*, 412 U.S. at 494.

The executive orders which formally created the reservations were submitted as exhibits below, App. at 116. Neither mentions fishing rights. These executive orders also vested no rights in any particular tribe.

> Neither the public notices of 1864 and 1865 nor the executive order of 1876 mentioned any Indian tribe by name, nor intimated which tribes were occupying or were to occupy the reservation.
>
> The President had complete discretion as to which tribes (or) the number of tribes . . . a statutory scheme, faithfully reflected by the omission of reference to any Indian tribe.

Short v. United States, 202 Ct. Cl. at 875-878.

This Court in *Mattz* held that a reservation still existed, but did not deal with what, if any, Indian fishing rights: "On remand, questions of fishing rights will be addressed. . . . " *Mattz*, 412 U.S. at 483.

The establishment of reservations *for the Hoopa and Yurok tribes* finally occurred in 1988, pursuant to the HYSA: "An Act to partition certain reservation lands between the Hoopa Valley Tribe and the Yurok Indians, to clarify the use of tribal timber proceeds, and for other purposes." 25 U.S.C. 1300i-1, App. 112. That Act does not mention fishing rights.

The Magnuson Act Prescribes Ocean Management Authority and Includes Indian Treaty Allocations.

The Magnuson Act was enacted in 1976 with several purposes. First, was the extension of United States fisheries jurisdiction to a 200-mile EEZ to eliminate foreign fishing off the coasts of the United States on U.S. stocks and promotes domestic commercial and recreational fishing. 16 U.S.C. § 1801(b), App. 95-97.

The management regime is adopted by Regional Fishery Management Councils on which the Fishermen and States are represented. The Pacific Council with jurisdiction over the West Coast salmon fishery is found at 16 U.S.C. § 1852(6), App. 99-100. The United States has only 1 vote of 13 total. The Council adopts plans and annual ocean management measures (16 U.S.C. § 1853). "*Indian treaty* fishing rights, if any" are required to be included by § a(2), App. 102.

The Pacific Council adopted a "Fishery Management Plan for Commercial and Recreational Salmon fisheries

off the Coasts of Washington, Oregon, and California commencing in 1978," soon after the Act. After six seasons, a Permanent Framework Plan was adopted in 1984. Ad. Rec., Vol. I B.E.

Over the years, the Council has considered and adopted numerous amendments to the Salmon Plan dealing with the Klamath River. Ad. Rec., Vol. I, No. B-4. Each amendment, after proper adoption by the Pacific Management Council was reviewed by a predecessor Secretary of Commerce, and duly became effective.

Proceedings Below.

Commerce and Interior announced by Joint News Release,[11] an agreement by the Secretaries to a "management plan" allocating fish to the Indian fishery and closing the 400 mile area to all but a small quota of sports fishery while opening the salmon fishery in other areas of the West Coast. (Exhibit A to Complaint, CR 52). The need for "opening" was later claimed as the emergency justifying Commerce's regulation. The regulation also claimed it could increase Klamath spawning.

A complaint was filed in May of 1993, shortly after the news release. In an effort to salvage some part of the 1993 season, Fishermen filed a summary judgment motion (CR 21-24) which attacked the "emergency" regulation, since the "new" spawning level had no scientific basis, and exceeded that of the Salmon Plan.

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[11] The actual rule was not adopted until May 6, 1993, five days after the opening, 58 C.F.R. 26922, Vol. II, No. 12.

The district court's order held such decisions could not be "simply a matter of political compromise." Since the record did not support the Secretary's selection of the new spawning escapement he remanded *to the Secretary of Commerce* (dated August 12, 1993, this order as amended November 3, 1993, is 837 F. Supp. at 1048, App. 85).

The Solicitor for Interior issued an Opinion in October, 1993, ER 125, concluding that Klamath River Indians were entitled to the 50% allocation of Northwest treaty tribes derived from *Fishing Vessel,* 443 U.S. 658 (1979). Both defendants admitted their intent to apply this 50% allocation long term. (*See* n. 3.)

The Fishermen filed Motion for Summary Judgment: Non Treaty Indian "Allocation" Violates the Magnuson Act, CR 85, and the United States filed a motion to dismiss. CR 90.

On July 29, 1994, the district court finally entered an order denying summary judgment to Fishermen, granting defendants' motion to dismiss, and judgment. CR 146, 147.

The court first reiterated his refusal to allow the adjudication of whether the 50% share was appropriate. "The court will *not* address, or allow adjudication of, any issue concerning the allocation, amount, or extent of, such rights with respect to any Tribe or plaintiff." Order, *Parravano v. Babbitt,* 861 F. Supp. at 918, n.3, App. 22.

The court held fishing rights granted by Executive order were vested in the Yurok and Hoopa tribes by the HYSA, 25 U.S.C. § 1300i: "Pursuant to this law, the Yurok and Hoopa Valley Tribes have a federally reserved fishing

right which includes fishing for ceremonial, subsistence and commercial purposes." 861 F. Supp. at 922-23, App. 34.

Conceding that the issue is "a matter of first impression," he cited and relied on this Court's *Fishing Vessel* case: "[F]or the Tribes' federally reserved fishing right to have any practical meaning, it must include regulation of activities occurring outside the reservation." 861 F. Supp. at 924, App. 37.

He rejected Fishermen' claim that, if not justified by treaty or statute, the allocation of fish to "Indians" is racial discrimination and that the Interior regulation allowing in-river commercial net fishing for "Indians" was a racial-defined instead of tribal group: "[C]lassification on the basis of 'Indian' status is neither racially discriminatory nor constitutionally impermissible." 861 F. Supp. at 926, n.10, App. 43. Accordingly, the 42 U.S.C. § 1981 and equal protection claims were dismissed.

As to the Klamath Act and Trinity Act claims, the Fishermen do have standing. 861 F. Supp. at 929, App. 51. The court acknowledged "legislative history discussing the seriousness of the degradation of the Klamath and Trinity Rivers and the frustration with past federal inaction" and that the APA (5 U.S.C. 706(1)) authorizes a district court to "compel agency action *unlawfully withheld or unreasonably delayed*" (emphasis by Court, 861 F. Supp. at 930, App. 53). He concluded, however, the Fishermen's complaint "only generally states that Secretary Babbitt has failed to implement measures to improve Klamath River runs, including habitat

improvement and fish planting measures." 861 F. Supp. at 930, App. 53.[12]

The Ninth Circuit affirmed "for the same reasons stated by the district court in its orders published at 837 F. Supp. 1034 and 861 F. Supp. 914: "We adopt those portions of the district court orders." *Parravano v. Masten*, 70 F.3d at 542, App. 3.

The Ninth Circuit noted: "We write only to emphasize that Indian fishing rights, whether they arise from treaty, statute, or executive order, are to be treated the same." 70 F.3d at 542, App. 3.

All fish cases cited dealt with treaty rights which were both explicitly guaranteed and specifically extended to off-reservation areas ("a right of taking fish, at all usual and accustomed grounds and stations . . . in common with all citizens" (10 Stat. 1133 as quoted in *Fishing Vessel* at 662.) This was the same language, of the same treaties in the fish case expressly relied upon by the Ninth Circuit: "*Washington Charterboat* applies here." 70 F.3d at 547, App. 16.

The Ninth Circuit incorrectly stated the equal protection claim was not appealed (n.1). This claim was, expressly continued, and Petitioners' Supplemental Citation of Authority included this Court's then-recent

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[12] Interior previously had refused to answer discovery directed to expenditures of the millions appropriated by Congress and failure to implement each of the specific measures enumerated in the acts. A Protective Order prohibited discovery pending the Motion to Dismiss. ER 230.

Adarand Constructors, Inc. v. Pena, No. 93-1841 (June 12, 1995).

The Ninth Circuit also misapprehended the argument with respect to the Klamath Restoration Act stating that the Fishermen "charged that Secretary Babbitt failed to comply (with the) Klamath Act . . . by failing to enforce limitations on Indian fishing in the Klamath River." The Ninth Circuit also incorrectly stated the district court held "that Parravano did not have standing" (*Cf.* "the Court finds that plaintiffs successfully allege standing," 861 F. Supp. at 930, App. 52.) The Ninth Circuit correctly noted the lower court dismissal was based on a conclusion there was no basis for judicial review under the Administrative Procedures Act. Presumably this was also affirmed: "We affirm for the same reasons stated by the district court in its orders." 70 F.3d at 541, App.3.

REASONS FOR GRANTING THE WRIT

The circuit court affirming of the grant by the Secretaries of treaty fishing rights for tribes whose executive order and statute are both silent on fishing, based expressly on this Court's decision in *Fishing Vessel*, requires supervision by this Court. This Court has continuously held Indian treaty rights are entitled to special constitutional status and protection which is called into question by a decision allowing political appointees to grant comparable rights, based on silence in executive orders.

Here, the decision contradicts long-standing interpretation by Commerce (and Interior) Secretaries and the

Pacific Management Council.[13] That the contrary conclusion was reached by "political compromise"[14] within months of becoming Secretary rebuts any argument that this is entitled to the customary deference due administrative agencies.

The decision conflicts in principle with recent decisions of other circuit courts. The D.C. Circuit has held that the United States Indian trust obligation depends on substantive law and extends only to those expressed in law: "Without an unambiguous provision by Congress that clearly outlines a federal trust responsibility, courts must appreciate that whatever fiduciary obligation otherwise exists, it is a limited one only." *Shoshone-Bannock Tribes v. Reno*, 56 F.3d 1476, 1482 (D.C. Cir. 1995). (*See, also*, decision in *Hynes v. Grimes Packing Co.*, 337 U.S. 86 at 103 (1949): "The quality of the [reservation] rights thereby secured . . . depend(s) upon the language or purpose of the congressional action."

The Tenth Circuit has determined that all special Indian off-reservation hunting and fishing rights (including treaty based) are extinguished upon admission of a state under the equal footing doctrine. *Crow Tribe v. Repsis*, ___ F.3d ___ (10th Cir. December 26, 1995, No. 94-8097). Here, California statehood predated the relevant executive orders.

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[13] That the Interior Solicitor's opinion followed rather than preceded the Secretaries' agreement calls into further question the legal analysis of the Secretaries and Solicitor.

[14] FOIA discovery into the political agreement were blocked: "The deliberative process privilege, however, clearly covers documents that will be politically sensitive." Order of September 13, 1993, CR 65.

This Court has held "treaty" to include other express agreements but only in the foreign relations context. *Weinberger, Secretary of Defense v. Rossi,* 456 U.S. 25 (1982).

Important federal statutory issues are involved since the decision frustrates Congress' intent in the Magnuson Act in three ways. It allows a political decision to overrule the longstanding Plan for Ocean Salmon Management established by the duly constituted Management Council. It treats non-treaty tribes as entitled to the same "Indian treaty rights" provided protection by that Act, § 1853(a)(2). The decision wastes a grossly disproportionate share of the salmon resource, so as to endanger efforts by states and citizens to rebuild the runs. The court's refusal to even consider the allocation issue[15] leaves the allocation a matter of absolute discretion of the Secretary and provides no remedy for Fishermen or others – including tribes with treaty or other claims.

The decision has already devastated some coastal communities of California and Oregon. As precedent, it will form the basis for similar claims from hundreds of Indian tribes in the Circuit, possibly including 220 Alaska native villages which are now "tribes for all purposes" under recent regulation of the same Secretary (citing an opinion of the same Solicitor). Notice, 60 Fed. Reg. No. 32 (February 16, 1995), 9250.

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[15] This Court in *Fishing Vessel* noted 50% was a maximum. The entitlement was "so much as, but no more than, is necessary to provide the Indians with a livelihood – that is to say, a "moderate living." *Fishing Vessel,* 443 U.S. at 686.

There are claims already pending in the Ninth circuit by two such non-treaty tribes with executive order reservations relying on the decisions below. *Confederated Tribes of Chehalis Indian Reservation and Shoalwater Bay Indian Tribe v. Washington*, 9th Circuit Nos. 95-35370 and 95-35371.

Indian Treaty Rights are Special and May Not Be Implied.

The Court of Appeals concluded that "a treaty/executive order distinction has no historical or legal significance," 70 F.3d at 544, App. 10.[16]

It has been noted that specific Magnuson Act language *and* express treaty off-reservation fishing rights justify a treaty allocation, as this Court held in *Fishing Vessel* (quoted infra at page 25). Those interests may meet the "compelling interests" test of *Adarand Construction*. Executive order silence does not meet the test.[17]

The circuit court seems to reach a conclusion comparable to this Court's *Weinberger, Secretary of Defense v. Rossi*, 456 U.S. 25 (1982), by ruling executive orders are entitled to the same treatment as treaties. However, the case is dramatically different. *Weinberger* considered a statute prohibiting employment discrimination against United States citizens on overseas bases which had a

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[16] This is factually incorrect, since a treaty was proposed with these tribes but was neither executed nor ratified and did not in any event mention fishing. (*Infra*, p. 9.)

[17] *See, also, The Borders of the Equal Protection Clause – Indians as People*, 33 U.C.L.A. L. Rev. #4 (April 1991).

specific proviso exempting such situations permitted by "treaty." This Court concluded in that statutory context "treaty" included other international agreements.

Similarly, the Magnuson Act generally requires non-discriminatory treatment of American fishermen[18] but has a specific proviso requiring councils to protect "Indian treaty fishing rights, if any." 16 U.S.C. § 1853(a)(2).

The Secretaries, with the approval of the Court below, have reached a result like that of *Weinberger:* recognize executive orders as equivalent to "treaties."

However, there are no "agreements" here. *Weinberger,* 456 U.S. at 32, notes 13 such explicit international agreements, which *predated* the statute. The Secretaries and courts below based their grant of treaty rights on unilateral executive orders reserving land with no mention of fishing.

In the international area, this Court noted "the President may enter into certain binding agreements with foreign nations. . . . " (*Weinberger,* at 30, n.6). Some such international agreements may be viewed as "treaties." With respect to Indians, however, "treaties" are no longer lawful. Since 1871, including the time of these executive orders, the President has been expressly prohibited by law from making "treaties" with Indians. (Act of March 3,

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[18] See, e.g., National Standard 4 "management measures shall not discriminate between residents of different states. [S]uch allocation shall be (A) fair and equitable to all such fishermen." 16 U.S.C. § 1851(4).

1871, ch. 120, 16 Stat. 544, codified at 25 U.S.C. § 71 (1988)).

A further Magnuson Act problem with granting "treaty" rights to executive order tribes should be noted. Based on the decision below, other non-treaty tribes are now claiming treaty-equivalent fishing rights in areas fished by *treaty* tribes. (*See Chehalis and Shoalwater v. Washington*, 9th Circuit Nos. 95-35370 and 95-35371.) Each of those tribes is opposed by tribes with treaty fishing rights recognized by this Court. If, or when, based on the opinion below, the Ninth Circuit Court holds them entitled to the same 50% share, how is the fishery to be shared, or are the "non-Indian" fisheries in the Northwest on those runs also to be totally destroyed?[19]

Conflicts or Inconsistent Circuit Court Decisions.

The lower court correctly noted this was a case of "first impression" so there are not direct conflicting circuit court decisions. Recent cases from two circuits, however, conflict in principle.

Shoshone-Bannock Tribes v. Reno, 56 F.3d 1476 (D.C. Cir. 1995) the D.C. Circuit rejected a tribal effort to compel the U.S. Government to advocate an implied tribal claim based on treaty language. That court held the Attorney General correctly rejected the tribal claim:

> While it is true that the United States acts in a fiduciary capacity in its dealings with Indian

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[19] A related question below was not dealt with. If a reservation tribe is entitled to 50%, why is not *each* (then what of the Karuk Tribe up-river)?

> tribal property, *United States v. Cherokee Nation of Oklahoma*, 480 U.S. 700 . . . , it is also true that the government's fiduciary responsibilities necessarily depend on the substantive laws creating those obligations. *United States v. Mitchell*, 463 U.S. 206 . . . (1983) (*Mitchell II; United States v. Mitchell*, 445 U.S. 535 . . . (1980) (*Mitchell I*). We agree with the district court that an Indian tribe cannot force the government to take a specific action unless a treaty, statute or agreement imposes, expressly or by implication, that duty.

Shoshone-Bannock Tribes, 56 F.3d at 1482 (per Randolph, Circuit Judge). *Hynes v. Grimes Packing Co.*, 337 U.S. 86 (1949). (Indian reservation rights depend on statute.)

Under this standard, the government was under obligation below to reject, not advocate, the tribal claims, since they had no statutory basis.

Another recent case from the Tenth Circuit deals with an Indian hunting claim founded in express treaty language. *Crow Tribe v. Repsis*, ___ F.2d ___ (10th Cir. December 26, 1995, No. 94-8097). That court relies upon directly controlling precedent from this Court. *Ward v. Race Horse*, 163 U.S. 504 (1896). The Tenth Circuit held (as had this Court) that even where a treaty expressly provided for Indian hunting, the right did not survive the State of Wyoming's admission into the Union under the equal footing doctrine.[20] The reservations here were created without any express fishing rights and were *not* created out of lands to which these tribes had any recognized claim. Most important, this was all done *after* the State of

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[20] California was specifically mentioned as entitled to similar status. *Ward v. Race Horse*, 163 U.S. at 247.

California had entered the Union in 1850. It was too late to create a right extending off-reservation even if the Executive wished (which no evidence supports).

The arguments Amicus of the State of California (and of nine other states)[21] as to the effects on state sovereignty and resources were not even addressed by the district or circuit courts.

The Court Expressly Adopts A Rule of Construction at Odds with This Court's Precedents.

The court below asserts "the rule of construction applicable to executive orders . . . is the same as that governing the interpretation of Indian treaties . . . " 70 F.3d at 544, App. 9.

This Court has rejected this argument where, as here, the document to be construed is not a product of a negotiated bargain:

> [C]ases from this court [citation omitted] are cited to the effect that Indian treaties and acts to which the Indians must give consent before they become operative must be interpreted so as to conform to the understanding of the Indians . . . But the legislation here in question is not in the nature of contract and contains no provision that makes it effectual only upon consent of the Indians.

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[21] Nine states joined California in the circuit, only six are identified in the Reported case.

United States v. First National Bank, 234 U.S. 245 (1914). *See, also*, F. Cohen, HANDBOOK OF FEDERAL INDIAN LAW (1982) at 224, note 60:

> The [rule] that treaties should be construed as the Indians would have understood them . . . would logically apply to agreements, which like treaties are bilateral transactions, but would not seem to apply to executive orders and statutes, neither of which directly involved negotiations with the tribes.

The Decision Contradicts Long-Standing Administrative and Congressional Interpretation.

This Court resolved in *Mattz* the threshold jurisdictional question of existence of the reservations but left for subsequent interpretation the question of what fishing rights were thereby preserved: "On remand, questions of fishing rights will be addressed. . . . " *Mattz*, 412 U.S. at 483.

The cases which followed in federal and California courts all dealt with the extent to which Indian fisheries within the reservation boundaries could be regulated. No court held the Indian fishery required destruction of geographically remote ocean fisheries. No prior administrative agency has so concluded.

The Pacific Management Council was appointed in 1977, adopted the first "Fishery Management Plan for Commercial and Recreational Salmon Fisheries off the Coasts of Washington Oregon, and Califonria" and has managed until 1993.

The Adm. R., Vol. I documents prior Commerce Secretaries' approval of that Council's Plans, Amendments, and regulations.

Each year the Pacific Council protected Indian treaty fishing rights. This is consistent with this court's decision in *Fishing Vessel*, 443 U.S. 658, rendered shortly after the Magnuson Act, and specifically noted of that Act:

> [T]he fish involved are caught in waters subject to the jurisdiction of the United States, rather than of the State, see 16 USC §§ 1811, 1812 [16 USCS §§ 1811, 1812], the persons catching them are nonetheless "citizens of the Territory" and as such the beneficiaries of the Indians' reciprocal grant of land in the treaties as well as the person expressly named in the treaties as sharing fishing rights with the Indians. Accordingly, they may justifiably be treated differently from non-treaty fishermen who are not citizens of Washington. The statutory provisions just cited are therefore important in this context only because they clearly place a responsibility on the United States, rather than the State, to police the take of fish in the relevant waters by Washington citizens insofar as is necessary to assure compliance with the treaties.

Fishing Vessel, 443 U.S. at 688.[22]

Fifteen years of annual seasons for the ocean have been adopted by the Pacific Council and duly implemented by Commerce.

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[22] Note under the decision below, citizens of other states, e.g., Oregon, are impacted. In this respect, these Klamath Indian rights now *exceed* treaty rights.

This long-standing administrative interpretation shows the understanding and interpretation of the Pacific Council and of each Secretary of Commerce (together charged by Congress with implementing the Magnuson Act) was contrary to the interpretation of the courts below. Congress has both reconsidered the Act and appropriated funding without disapproving that consistent interpretation.

During this period the fishery of the Klamath River tribes was not disregarded, nor were the other in-river sports fisheries, which occur in most coastal streams including the Klamath. The Pacific Council has always considered those fisheries and provided fish into rivers with the expectation of their continuance.

Specific provision for both in Klamath River fisheries was made explicit when Congress passed the Klamath Restoration Act in 1980 (App. 89-93). In addition to specific restoration requirements imposed on Interior, the Act set up a Klamath Fishery Management Council, with representation of the in-river sports, the ocean commercial and sports and two representatives of the Indian fisheries (as well as state and federal (*see* App. 92-93.) This Klamath Fishery Council provides recommendations "to the Pacific Fishery Management Council regarding ocean harvesting regulations" Klamath Restoration Act, App. 91. In 1993, the Secretaries below disregarded both this statute and the Klamath Council. The courts below never even mentioned the Klamath Council's role, despite argument of Fishermen.

Again, long-standing congressional and administrative interpretation as to implementation of these Klamath

River Indian and sports fisheries was disregarded by the Court.

This Court has previously recognized this as one basis for granting of certiorari. *Morton v. Ruiz,* 415 U.S. 199 (1974): "We granted certiorari because of the significance of the issue and because of the vigorous assertion that the judgment of the Court of Appeals was inconsistent with long-established policy of the Secretary and of the Bureau." *Morton v. Ruiz,* at 201-202.

The record includes the Pacific Management Council "vigorous assertion" protesting the 1993 Commerce action, e.g.:

> [which] degrades the credibility of the Council and the Federal government and . . . makes it impossible to make rational business decisions for fishery industry participants. . . . To not have any clear legal justification for the increased tribal allocation prior to the increase being implemented further exacerbates public distrust of Federal fisheries management.

Response by Council to Secretary Brown, Adm. R., Vol. IV, 118.[23]

The Lower Court's Decision Destroyed the Livelihood of Fishermen and Coastal Communities and Wasted Salmon.

The fishery closed was a significant part of the economic basis for coastal communities. The Record includes

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[23] An affidavit filed by the Council opposing the action was rejected by the district court. App. 60-63.

calculation of conservative estimates of the economic effect of salmon landed commercially and a value of sports caught fish. Those figures are in the record utilized by the Pacific Council in its Plan process. The effect of closing these ports is admittedly underestimated by use of such economic calculation.

The Governor of the State of California summarized:

> The decision will severely impact California's rural coastal economies which depend on the salmon fishery for employment, recreation, and tourism. Your decision will significantly undermine prospects for economic recovery in California's rural Northcoast.
>
> . . .
>
> Worse yet, your decision will undermine the prospects to achieve the State's commitment to doubling its salmon populations.

Letter of June 4, 1993, California Governor Wilson to Commerce Secretary Brown and Interior Secretary Babbitt, Adm. R. 127.

The closure of the Pacific Ocean fishery has an effect on the capture of salmon from – and destined to – many coastal streams. The loss to fisheries in that area includes more non-Klamath salmon than Klamath. All these are lost; some to other predators, some return to streams in excess of the spawning goals or hatchery needs.

Commerce, and the courts below, had only the 1993 projections. "The alternative seasons reduce the ocean commercial and recreational harvest of chinook salmon in the ocean south of Cape Falcon, Oregon, by about 89,000

fish from the level of harvest recommended by the Council." Adm. R. 13, p. 2, 58 Fed. Reg. 106 31665. Such losses continue.

Numerous Tribes in the Ninth Circuit Have Similar Claims, Affecting All Pacific Ocean Fisheries.

The basis for the Circuit Court's decision is clearly applicable to other tribes. There are already several cases pending in the Ninth Circuit in which non-treaty tribes with an executive order reservations claim they have the same fishing rights as treaty tribes. These cases (consolidated) are *Chehalis and Shoalwater v. Washington,* 9th Circuit Nos. 95-35370 and 95-35371. The Shoalwater Tribe claims:

> There is no difference legally between *Parravano,* where the executive intended to allow the Tribe to affect off-reservation fishing activities, and the instant case where the executive intended to allow the two tribes here to actually take fish off-reservation.

Plaintiff/Appellant Shoalwater Bay Indian Tribe's Reply Brief, p. 5. Similarly, the Chehalis Tribe relies on the decision below:

> In *Parravano v. Masten,* 70 F.3d 539 (9th Cir. 1995), furthermore, no such 'express' statement was required in order to find that fisheries were reserved on and off-reservation.

Plaintiff/Appellant – Cross Appellee Confederated Tribes of the Chehalis Indian Reservation Reply Brief, p. 4.

These are only the first of many such claims, since most "Indian" tribes in the Northwest and most Alaskan

Native Villages are located on streams or tributaries with salmon runs.

The notable recent additions to this list of potential claimant tribes is occasioned by the Department of Interior's decision to list all the 220 Alaska Native village as "Tribes" with the "same status as tribes in the contiguous 48 states . . . entitled to the same protection, immunities, privileges as other acknowledged tribes. . . . " 58 Fed. Reg. 54363-54366 (Oct. 21, 1993)

See, also, 1995 list of tribes 60 Fed. Reg. 9250 (Feb. 16, 1995) from which the above number was taken, adding "Tribes" in other states within the Ninth Circuit. At least one, "the Karuk Tribe of California," is located up river on the Klamath River from the two tribes here considered.

In such cases, the ironic result could be either a reduction in the share of fish caught by a treaty tribe (party to *Fishing Vessel*) or a total destruction of the "non-Indian" share. If the treaty Indian share is held to be 50% and the "executive order tribe" share is the same 50% as held below, there is nothing left for other "non-Indian" citizens.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

DATED this 14th day of February, 1996.

Respectfully submitted:

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Attorney for Appellants

Pietro PARRAVANO; Wayne Heikkila; Marguerite Dodgin; Earl Carpenter; David Bitts; Liz Henry; Norman L. De Vall; Pacific Coast Federation of Fishermen's Associations, Inc.; Humboldt Fishermens' Marketing Association; Caito Fisheries, Inc.; Golden Gate Fisherman's Association; Salmon Trollers Marketing Association, Plaintiffs-Appellants,

v.

Sue MASTEN, Intervenor-Appellee, and Bruce Babbitt, Secretary of the United States Department of Interior; Ron Brown, Secretary, United States Department of Commerce, Defendants-Appellees.

No. 94-16727.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted Oct. 17, 1995.

Decided Nov. 16, 1995.

Before: SKOPIL, PREGERSON, and FERNANDEZ, Circuit Judges.

PREGERSON, Circuit Judge:

Pietro Parravano, other commercial fishermen, and commercial fishing associations (collectively "Parravano") appeal the district court's order granting partial summary judgment in favor of defendants Interior Secretary Babbitt and Commerce Secretary Brown and dismissing the remainder of Parravano's claims.

In United States District Court, Parravano alleged that Secretary Brown violated the Magnuson Fishery Conservation and Management Act ("Magnuson Act"), 16

U.S.C. § 1801 *et seq.*, when he issued an emergency regulation that reduced the ocean harvest rate of Klamath River chinook for the fall 1993 season. The district court determined that executive orders issued in 1876 and 1891 and the 1988 Hoopa-Yurok Settlement Act, 25 U.S.C. § 1300i *et seq.*, vested the Hoopa Valley and Yurok Tribes (the "Tribes") with federally reserved fishing rights. The district court found that these fishing rights constituted "any other applicable law," 16 U.S.C. § 1854(a)(1)(B), which the Secretary of Commerce could take into consideration when reviewing fishery management policies under the Magnuson Act. For this reason, the district court concluded that Secretary Brown did not violate the Magnuson Act when he issued emergency regulations for the fall 1993 ocean harvest.

Parravano also charged that Secretary Babbitt failed to comply with the Klamath River Basin Fishery Resources Restoration Act ("Klamath Act"), 16 U.S.C. § 460ss, and the Trinity Basin Act ("Trinity Act"), Pub.L. No. 98-541, by failing to enforce limitations on Indian fishing in the Klamath River. The district court dismissed the claims against Secretary Babbitt, concluding that there was no basis for judicial review under the Administrative Procedure Act, 5 U.S.C. § 551 *et seq.*, and that Parravano did not have standing because there was neither an explicit nor an implicit private right of action under the Klamath and Trinity Acts.[1] Parravano now appeals.

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[1] In district court, Parravano also charged that the actions of Secretaries Brown and Babbitt violated the Civil Rights Act, 42 U.S.C. § 1981, the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552b, and the United States Constitution. The district

We have jurisdiction under 28 U.S.C. § 1291. We affirm for the same reasons stated by the district court in its orders published at 837 F.Supp. 1034 (N.D.Cal.1993) and 861 F.Supp. 914 (N.D.Cal.1994). Accordingly, we adopt those portions of the district court orders relating to the issues raised by Parravano on appeal. We write only to emphasize that Indian fishing rights, whether they arise from treaty, statute, or executive order, are to be treated the same under the Magnuson Act.

BACKGROUND

We incorporate by reference the factual background to this case as set forth by the district court at 837 F.Supp. at 1038-39 and 861 F.Supp. at 917. We discuss only those facts relevant to the issues raised on appeal.

I

The Klamath River fall chinook salmon is an anadromous fish that takes its name from the Klamath River where it spawns. By their very nature, anadromous fish live transient lives. They hatch in the upper tributaries of rivers such as the Klamath and migrate down to the Pacific Ocean where they spend much of their adulthood. At the age of three or four years, they instinctively return to the tributaries of their natal river where they spawn and then die. For generations, the Hoopa Valley

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court held that this action did not present any due process or equal protection violations. *See Parravano v. Babbitt*, 861 F.Supp. 914, 926-931 (N.D.Cal.1994). Parravano does not appeal these holdings.

and Yurok Indian tribes have depended on the Klamath chinook salmon for their nourishment and economic livelihood. *See Arnett v. 5 Gill Nets*, 48 Cal.App.3d 454, 121 Cal.Rptr. 906, 907-909 (1975); *cert. denied*, 425 U.S. 907, 96 S.Ct. 1500, 47 L.Ed.2d 757 (1976); Memorandum from John D. Leshy, Solicitor of the Department of the Interior to the Secretary of the Interior 8 (Oct. 4, 1993) ("Interior Solicitor's Opinion"). In the past, we have observed that the Tribes' salmon fishery was "not much less necessary to [their existence] than the atmosphere they breathed." *Blake v. Arnett*, 663 F.2d 906, 909 (9th Cir.1981) (internal quotations omitted).

In 1876, President Grant issued an executive order formally establishing a reservation for the Tribes "to be set apart for Indian purposes, as one of the Indian reservations authorized to be set apart, in California, by Act of Congress approved April 8, 1864." I.C. Kappler, *Indian Affairs: Laws and Treaties* 815 (1904). In the years following the 1876 executive order, non-Indians encroached upon the Indian fisheries along the Klamath River, challenging the Indians' fishing rights. Interior Solicitor's Opinion, at 6. To resolve this problem, in 1891 President Harrison issued another executive order under the authority of the 1864 Act. *See Donnelly v. United States*, 228 U.S. 243, 258-59, 33 S.Ct. 449, 453-54, 57 L.Ed. 820 (1913), *modified on other grounds*, 228 U.S. 708, 33 S.Ct. 1024, 57 L.Ed. 1035 (1913). The 1891 order extended the Hoopa Valley Reservation to include the old Klamath Reservation and the strip of land connecting the two reservations. *See Mattz v. Arnett*, 412 U.S. 481, 493-94, 93 S.Ct. 2245, 2252-53, 37 L.Ed.2d 92 & app. (1973). Together, the 1876 and 1891

executive orders created the extended Hoopa Valley Reservation, which ran along both sides of the Klamath River, from the mouth of the Trinity River down to the Pacific Ocean. *See id.*

In 1988, Congress enacted the Hoopa-Yurok Settlement Act to divide the extended Hoopa Valley Reservation into the Yurok Reservation and Hoopa Valley Reservation. 25 U.S.C. § 1300i. One of the concerns of Congress at the time of the 1988 partitioning was to protect the Tribes' fisheries. *See* Partitioning Certain Reservation Lands Between the Hoopa Valley Tribe and the Yurok Indians, to Clarify the Use of Tribal Timber Proceeds, and For Other Purposes, S.Rep. No. 564, at 14-15; H.R.Rep. No. 938, Pt. 1, at 20.

II

Congress enacted the Magnuson Act, 16 U.S.C. § 1801, to conserve ocean fishing resources and to protect these resources from foreign fishing. The Magnuson Act delegated to the Secretary of Commerce the authority to set harvest levels in ocean fisheries located between three and two hundred nautical miles offshore, 16 U.S.C. § 1851. The Magnuson Act also established regional Fishery Management Councils, which are charged with recommending to the Secretary of Commerce ocean harvest limits and salmon "escapement" levels.[2] 16 U.S.C. § 1852. The Secretary of Commerce reviews the regional councils'

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[2] "Escapement" literally refers to the number of salmon that are allowed to "escape" harvest and to spawn.

recommendations for consistency with the national standards set forth in the Magnuson Act and "any other applicable law." 16 U.S.C. § 1854(a)(1)(B).[3] The Magnuson Act, however, does not require the Secretary to follow a regional council's recommendations; he may reject them and, when necessary, promulgate ninety-day emergency regulations in their stead. 16 U.S.C. §§ 1854, 1855(b).

The regional council charged with formulating recommendations for the Klamath River chinook harvest is the Pacific Fishery Management Council ("Pacific Council"). Through the fall of 1993, Pacific Council had consistently failed to set harvest regulations sufficient to meet conservation requirements, forcing the Interior Department to severely curtail Indian salmon harvesting in the Klamath River. According to the Interior Department, this failure was adversely affecting the Tribes' reservation fisheries. *See* Letter from Eddie F. Brown, Assistant Secretary for Indian Affairs, Department of the Interior, to Barbara Hackman Franklin, Secretary of Commerce, 1-3

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[3] 16 U.S.C. § 1854(a)(1)(B) provides:

> (1) After the Secretary receives a fishery management plan, . . . which was prepared by a Council, the Secretary shall –
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> * * *
>
> (B) Immediately commence a review of the management plan or amendment to determine whether it is consistent with the national standards, the other provisions of this chapter, and *any other applicable law.*

(Emphasis added).

(May 19, 1992) ("Brown Letter"). Seeking a more equitable distribution of the Klamath chinook resource, Secretary Babbitt met with Secretary Brown to coordinate regulation of the fall 1993 harvest. Secretary Babbitt informed Secretary Brown that the Interior Department believed that the Tribes were entitled to a fifty-percent share of the total Klamath chinook harvest and that ocean harvesting of this salmon would have to be curtailed so that a sufficient number of the fish could reach the Klamath River for tribal harvests as well as for spawning. *See* Interior Solicitor's Opinion, at 27.

On April 14, 1993, Pacific Council recommended harvest levels for the fall season. Although Secretary Brown had announced his desire to issue regulations consistent with providing the Tribes with a fifty-percent allocation of the salmon, Pacific Council authorized a 22% ocean harvest rate, with a spawning escapement floor of 35,000 fish. These ocean harvest levels exceeded the levels necessary to reserve fifty percent of the harvest for the Tribes' Klamath River fisheries. Faced with the possibility that Pacific Council's recommended ocean harvest levels would either fail to meet Magnuson Act goals or would compromise the resource rights of the Tribes, Secretary Brown suspended Pacific Council's regulations. Because of the imminent commencement of the fall 1993 season, he issued ninety-day emergency regulations that set a lower ocean harvest rate of 14.5% and a higher salmon escapement floor of 38,000 fish for the fall 1993 season.

STANDARDS OF REVIEW

We review the district court's grant of summary judgment de novo. *Warren v. City of Carlsbad*, 58 F.3d 439, 441 (9th Cir.1995), *petition for cert. filed*, 64 U.S.L.W. 3271 (Sept. 20, 1995). We review interpretations of statutes and regulations de novo. *Forest Conservation Council v. Rosboro Lumber Co.*, 50 F.3d 781, 783 (9th Cir.1995) (statute); *Hopi Tribe v. Navajo Tribe*, 46 F.3d 908, 918 (9th Cir.1995), *cert. denied*, ___ U.S. ___, 116 S.Ct. 337, ___ L.Ed.2d ___(1995) (regulation). With respect to an action taken by the Secretary of Commerce under the Magnuson Act, we have limited judicial review, 16 U.S.C. § 1855(b), and may only invalidate the challenged action if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A); *Pacific Coast Federation of Fishermen's Ass'ns v. Secretary of Commerce*, 494 F.Supp. 626, 627-28 (N.D.Cal.1980).

As for Indian affairs, we must assume that the Department of the Interior has been given reasonable power to discharge effectively its broad responsibilities in this area. *United States v. Eberhardt*, 789 F.2d 1354, 1361 (9th Cir.1986); *Udall v. Littell*, 366 F.2d 668, 672 (D.C.Cir.1966), *cert. denied*, 385 U.S. 1007, 87 S.Ct. 713, 17 L.Ed.2d 545 (1967) Thus, although we review questions of statutory interpretation de novo, in reviewing the Secretary's actions, we give substantial deference to his interpretation of the applicable statutes and executive actions that give rise to tribal rights. *See Udall v. Tallman*, 380 U.S. 1, 16, 85 S.Ct. 792, 801, 13 L.Ed.2d 616 (1965).

Statutory interpretation and standing issues raised under the Klamath and Trinity Acts are reviewed de

novo. *See ACF Indus., Inc. v. California State Bd. of Equalization*, 42 F.3d 1286, 1289 (9th Cir.1994).

CONSTRUCTION OF STATUTES AND EXECUTIVE ORDERS ESTABLISHING, MODIFYING OR EXTINGUISHING INDIAN RESERVATIONS

The rule of construction applicable to executive orders creating Indian reservations is the same as that governing the interpretation of Indian treaties. Executive orders, no less than treaties, must be interpreted as the Indians would have understood them "and any doubtful expressions in them should be resolved in the Indians' favor." *Choctaw Nation v. Oklahoma*, 397 U.S. 620, 631, 90 S.Ct. 1328, 1334, 25 L.Ed.2d 615 (1970); *United States v. State of Washington*, 969 F.2d 752, 755 (9th Cir.1992), *cert. denied*, ___ U.S. ___, 113 S.Ct. 1945, 123 L.Ed.2d 651 (1993). In interpreting statutes that terminate or alter Indian reservations, we construe ambiguities in favor of the Indians. *DeCoteau v. District County Court for Tenth Judicial Dist.*, 420 U.S. 425, 444, 95 S.Ct. 1082, 1092, 43 L.Ed.2d 300 (1975); *Confederated Salish and Kootenai Tribes of Flathead Reservation, Mont. v. Namen*, 665 F.2d 951, 955 (9th Cir.1982), *cert. denied*, 459 U.S. 977, 103 S.Ct. 314, 74 L.Ed.2d 291 (1982). Rights arising from these statutes must be interpreted liberally, in favor of the Indians. *Pacific Coast*, 494 F.Supp. at 633 n. 6 (citing *Choate v. Trapp*, 224 U.S. 665, 675, 32 S.Ct. 565, 569, 56 L.Ed. 941 (1912)).

ANALYSIS

Under the Magnuson Act, the Secretary of Commerce may issue emergency regulations to achieve consistency

with the national standards set forth in the Act and "any other applicable law." 16 U.S.C. §§ 1853(a)(1)(C), 1854(a)(1)(B). Indian fishing rights that exist under federal law may constitute "any other applicable law." *Washington State Charterboat Ass'n v. Baldrige*, 702 F.2d 820, 823 (9th Cir.1983), *cert. denied*, 464 U.S. 1053, 104 S.Ct. 736, 79 L.Ed.2d 194 (1984) (Northwest Indian treaty fishing rights constitute "other applicable law" under Magnuson Act). Therefore, the question before this court is whether the Hoopa Valley and Yurok Tribes retain federally reserved fishing rights that constitute "any other applicable law" within the meaning of the Magnuson Act. They do.

I

Parravano contends that the Tribes hold no fishing rights that constitute "other applicable law" within the meaning of the Magnuson Act because their reservations were created not by treaty but by executive orders authorized by Congress. The problem with Parravano's position is threefold. First, a treaty/executive order distinction has no historical or legal significance with respect to the Tribes involved here. Second, a treaty/executive order distinction contradicts the doctrine that the grant of hunting and fishing rights is implicit in the setting aside of a reservation "for Indian purposes." Third, a treaty/executive order distinction is inconsistent with the well-established federal trust obligation owed to the Indian tribes.

Parravano argues that affording equal dignity to tribal fishing rights emanating from executive orders unfairly grants rights to executive order reservation

tribes. He asserts that such a holding would debase the rights of treaty tribes. Parravano reasons that enforcing the Tribes' fishing rights would grant promises made to Indian tribes through executive order the same solemnity as promises made to tribes by treaty. These arguments are unpersuasive and contrary to federal law and policy.

We have long held that when it comes to protecting tribal rights against non-federal interests, it makes no difference whether those rights derive from treaty, statute or executive order, unless Congress has provided otherwise. *See, e.g., United States v. Southern Pac. Transp. Co.*, 543 F.2d 676, 685-86 (9th Cir.1976); *Gibson v. Anderson*, 131 F. 39, 41-42 (9th Cir.1904); *McFadden v. Mountain View Mining & Milling Co.*, 97 F. 670, 673 (9th Cir.1899), *rev'd on other grounds* 180 U.S. 533, 21 S.Ct. 488, 45 L.Ed. 656 (1901).

With respect to the Hoopa Valley and Yurok Tribes, the California courts concluded nearly two decades ago that, as against non-federal interests, tribal rights derived from executive order are treated the same as treaty rights. In *Arnett v. 5 Gill Nets*, the California Court of Appeal acknowledged that the executive orders establishing the extended Hoopa Valley Reservation created recognizable fishing rights. *See Arnett*, 121 Cal.Rptr. at 907-909. In fact, the *Arnett* court sharply rejected a treaty/executive order distinction, aptly noting that the Hoopa Valley Reservation was created by executive order authorized by federal statute. *See id.* at 460, 121 Cal.Rptr. at 909-10.

In 1976, when the State of California petitioned the United States Supreme Court for certiorari in *Arnett*, the federal government opposed the petition, arguing that

the fishing rights of these Tribes were tantamount to treaty rights. As Solicitor General Robert Bork explained to the Court:

> That executive orders played a prominent role in the creation of the [Hoopa Valley] Reservation does not change this result [that the United States reserved to the Indians the right to fish on the Reservation without state interference]. Regardless of the manner in which a reservation is created the purpose is generally the same: to create a federally-protected refuge for the tribe. . . .
>
> With respect to fishing rights we see no reason why a reservation validly established by executive order should be treated differently from other reservations.

Memorandum for the United States as Amicus Curiae, at 5 (writing in opposition to California's petition for a grant of certiorari in *Arnett*).

Solicitor General Bork's conclusion was well-founded. Although the Executive Branch engaged in treaty-making with the Indian tribes before 1871, in that year Congress decided that it would no longer negotiate treaties with the tribes. Congress thus suspended the entire process of treaty negotiation with the Indian tribes and delegated power to the President to create specified numbers of Indian reservations. 25 U.S.C. § 71. "Reservations established after 1871 were accordingly created either by statute or, until Congress ended the practice in 1919, by executive order." William C. Canby, *American Indian Law* 17-18 (2d ed.1988).

Because of this historical background, we emphasize that there are no broad distinctions between Indian reservations created before 1871 and those created after. Although their manner of creation is different, they are substantively the same, at least with respect to non-federal interests. We agree with the observation that:

> [M]any federal Indian law decisions, especially those dealing with developments since the mid-nineteenth century, turn not on treaty language, but on the text of seemingly more mundane instruments of law, such as statutes, executive orders, and federal regulations. . . . This difference in form should not, however, substantially alter judicial methodology. Some of these non-treaty enactments embody agreements with tribes that would have been handled by treaty in former eras.

Philip P. Frickey, *Marshalling Past and Present: Colonialism, Constitutionalism and Interpretation in Federal Indian Law,* 107 Harv.L.Rev. 381, 421 & n. 164 (1993).

With Congress's authorization, the 1876 and 1891 executive orders first created and then extended a reservation "for Indian purposes" along the main course of the Klamath River. *Donnelly,* 228 U.S. at 253, 33 S.Ct. at 451. We have never encountered difficulty in inferring that the Tribes' traditional salmon fishing was necessarily included as one of those "purposes." *See United States v. Wilson,* 611 F.Supp. 813, 817-18 (N.D.Cal.1985), *rev'd on other grounds sub. nom., United States v. Eberhardt,* 789 F.2d 1354 (9th Cir.1986). Our interpretation accords with the general understanding that hunting and fishing rights arise by implication when a reservation is set aside for Indian purposes. *See Menominee Tribe v. United States,* 391

U.S. 404, 406, 88 S.Ct. 1705, 1707, 20 L.Ed.2d 697 (1968); *Pacific Coast*, 494 F.Supp. at 632. Thus, we reject Parravano's novel theory that ambiguity in the phrase "for Indian purposes" should be resolved against the Tribes.

In partitioning the original reservation in 1988, Congress recognized the importance of the Tribes' rights to fish along the Klamath River. Although the 1988 Hoopa-Yurok Settlement Act did not explicitly set aside fishing rights, it did make clear that the partitioning would not dispossess the Tribes of their assets. The legislative history of the 1988 Act indicates that Congress was aware that each Tribes' interests in their salmon fisheries was one of its principal assets. For example, Congress explained that:

> The legislation will also establish and confirm the property interests of the Yurok Tribe in the Extension, including its interest in the fishery, enabling the Tribe to organize and assume governing authority in the Extension.

S.R. 564, 100th Cong., 2d Sess., 2-9 (1988); H.R. 938, Pt. 1, 100th Cong., 2d Sess., 8-15. Given this legislative history, we cannot accept Parravano's invitation to interpret the 1988 Hoopa-Yurok Settlement Act as a divestiture of the Tribes' federally reserved fishing rights. Barring explicit Congressional instructions to the contrary, we must construe any ambiguities in the executive orders and in the 1988 Hoopa-Yurok Settlement Act in the Tribes' favor. *See DeCoteau*, 420 U.S. at 444, 95 S.Ct. at 1092; *Confederated Salish and Kootenai Tribes*, 665 F.2d at 955.

We have noted, with great frequency, that the federal government is the trustee of the Indian tribes' rights,

including fishing rights. *See, e.g., Joint Bd. of Control v. United States,* 862 F.2d 195, 198 (9th Cir.1988). This trust responsibility extends not just to the Interior Department, but attaches to the federal government as a whole. Eberhardt, 789 F.2d at 1363 (Beezer, J., concurring); *see also Pyramid Lake Paiute Tribe v. United States Dept. of Navy,* 898 F.2d 1410, 1420 (9th Cir.1990); *Covelo Indian Community v. FERC,* 895 F.2d 581, 586 (9th Cir.1990). In particular, this court and the Interior Department have recognized a trust obligation to protect the Yurok and Hoopa Valley Tribes' rights to harvest Klamath chinook. *See Eberhardt,* 789 F.2d at 1359-62; Interior Solicitor's Opinion, at 29.

Secretary Brown fulfilled his federal trust obligations by issuing emergency regulations for the fall 1993 ocean harvest of Klamath chinook. The Secretary acted in response to ocean overharvesting of Klamath chinook which threatened the Tribes' ability to harvest their share of the salmon. *Parravano,* 861 F.Supp. at 914. Upon these facts, we agree with the district court that Secretary Brown did not act arbitrarily or capriciously when he chose to reformulate Pacific Council's fishing recommendations to guarantee that the Tribes would receive their fair share of the salmon harvest.

II

Parravano argues that even if the Tribes have fishing rights, these rights cannot extend outside of the reservation because they do not derive from a treaty. According to this reasoning, because the Tribes' fishing rights arise

out of executive orders, the Secretary of Commerce cannot regulate ocean fishing in order to protect Indian salmon harvests. We rejected a similar argument in *Washington Charterboat*. There, we found that there is "nothing in the language of the Magnuson Act or in its legislative history that even remotely suggests that Congress intended to abrogate or modify" Indian treaties which included salmon fishing rights. *Washington Charterboat*, 702 F.2d at 823. Because we reject a broad treaty/executive order distinction, especially with regard to the Hoopa Valley and Yurok Tribes' fishing rights, *Washington Charterboat* applies here.

The Klamath chinook is an anadromous species. As a result, successful preservation of the Tribes' on-reservation fishing rights must include regulation of ocean fishing of the same resource. Indeed, allowing ocean fishing to take all the chinook available for harvest before the salmon can migrate upstream to the Tribes' waters would offer no protection to the Indians' fishing rights. We must conclude, as we did in *Washington Charterboat*, that the Tribes' federally reserved fishing rights are accompanied by a corresponding duty on the part of the government to preserve those rights.

Our conclusion is not a new one. Nearly a decade has elapsed since Judge Beezer of this court first observed uncoordinated regulation of Pacific Ocean fishing and the Tribe's fisheries. *See United States v. Eberhardt*, 789 F.2d 1354, 1363 (9th Cir.1986) (Beezer, Circuit Judge, concurring). He noted then, as we note now, that overharvesting of the Klamath chinook in the Pacific Ocean results in dwindling numbers of salmon able to survive for spawning. *Id.*; Brown Letter at 1-3. Low spawning levels, in turn, reduce further the number of Klamath chinook

available for future harvests, thus creating long-term conservation concerns. *See Eberhardt*, 789 F.2d at 1363 (Beezer, Circuit Judge, concurring).

Specific harm to the Indians' fisheries is clear. The low numbers of salmon escaping Pacific trolling nets has forced the Department of the Interior to preserve a sufficient number of salmon for spawning by dramatically reducing the number of salmon that the Tribes are allowed to harvest. The government has continued to allow ocean fishermen to overharvest the Klamath chinook. This ocean overharvesting has reduced the number of salmon remaining for upstream reproduction and, as a result, has only increased the conservation burden placed on the Tribes. *Id.*; *see also* Brown Letter, at 1-3.

Given Pacific Council's past reluctance to set ocean harvest levels that would guarantee adequate upstream spawning for conservation of the Klamath chinook, as well as the imminent harm that would befall the Tribes if ocean overharvesting were allowed to continue, Secretary Brown had ample justification for an emergency departure from Pacific Council's recommendations. Indeed, the Magnuson Act requires the Secretary to scrutinize carefully the suggested harvest levels promulgated by the regional councils. When the councils' recommendations threaten conservation goals or undermine other federal laws and obligations, the Secretary must reject them. If the councils refuse to comply with national standards or "any other applicable law," the Secretary may need to issue emergency regulations. Here, Secretary Brown issued emergency regulations to conserve salmon runs and to ensure consistency with "any other applicable

law," which includes the Tribes' federally reserved fishing rights. *Parravano,* 837 F.Supp. at 1042-44; 861 F.Supp. at 914. The district court therefore correctly held that Secretary Brown's actions were not arbitrary, capricious, or an abuse of discretion.

CONCLUSION

We affirm the district court's orders. In so doing, we emphasize that Indian rights arising from executive orders are entitled to the same protection against non-federal interests as Indian rights arising from treaties. *See Southern Pac. Transp. Co.,* 543 F.2d at 685-86.

Under the Magnuson Act, the Secretary of Commerce may issue regulations affecting coastal fishing to protect against violations of "other applicable law." The 1876 and 1891 executive orders that created the extended Hoopa Valley Reservation and the 1988 Hoopa-Yurok Settlement Act vested the Tribes with federally reserved fishing rights that constitute "other applicable law" within the meaning of the Magnuson Act.

Secretary Brown is a trustee of tribal interests as well as the administrator of the Magnuson Act; he properly considered the Tribes' federally reserved fishing rights in issuing emergency regulations reducing ocean harvest limits of the Klamath chinook.

Finally, because of the migratory nature of the Klamath chinook, the protection of upstream tribal fishing rights depends on coordinating regulation of ocean and river fishing.

AFFIRMED.

PARRAVANO v. BABBITT
861 F.Supp. 914 (N.D.Cal. 1994)

Pietro PARRAVANO, Wayne Heikkila, Marguerite Dodgin, Earl Carpenter, David Bitts, Liz Henry, Norman L. de Vall, Pacific Coast Federation of Fishermens' Associations, Humboldt Fishermens' Marketing Association, Caito Fisheries, Inc., Golden Gate Fishermens' Association, and Salmon Trollers Marketing Association, Plaintiffs,

v.

Bruce BABBITT, as Secretary of the United States Department of the Interior, and in his individual capacity; Ron Brown, as Secretary of the United States Department of Commerce, and in his individual capacity, Defendants.

No. C 93-2003 TEH.

United States District Court,
N.D. California.

July 29, 1994.

ORDER

THELTON E. HENDERSON, Chief Judge.

This matter came before the Court on April 25, 1994 on defendants' Motion to Strike or to File a Supplemental Opposition to *Amicus* Memoranda, plaintiffs' Motion for Partial Summary Judgment, plaintiffs' Motion to Strike Extraneous Matters, and defendants' Motion to Dismiss. After careful consideration of the parties' oral and written arguments and the record herein, the Court grants defendants' motions to file a supplemental opposition

and to dismiss, and denies plaintiffs' motions to strike and for partial summary judgment.

FACTUAL BACKGROUND:

The focal point of this action is the popular Klamath River fall chinook salmon. These anadromous fish spawn in the Klamath River and its upper tributaries, migrate downstream to the ocean, and then return to their fresh water origins at age three or four to spawn and then die. An unfortunate combination of overfishing, prolonged drought, and habitat degradation have led to significantly depressed levels of Klamath chinook stock, to the detriment of commercial fishing interests, sport fishermen, and the Native American tribes who rely on these fish for subsistence and ceremonial needs. *See, United States v. Eberhardt*, 789 F.2d 1354, 1363 (9th Cir.1986) (conc. opin.) (overfishing has depleted the stocks of Klamath River fish). The conflicts inherent in having a chinook population too small to satisfy the needs of all who have a stake in the Klamath salmon are what underlie this case.

Plaintiffs are commercial fishermen and commercial fishing associations[1] who contend that the Secretary of Commerce ("Secretary Brown") improperly reduced the Klamath chinook ocean harvest rate for the 1993 fall fishing season. They contend that Secretary Brown's

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[1] In addition to seven individual plaintiffs, there are five organizational plaintiffs: Pacific Coast Federation of Fishermen's Associations, Humboldt Fishermen's Marketing Association, Caito Fisheries, Inc., Golden Gate Fishermen's Association, and the Salmon Trollers Marketing Association.

actions violate the Magnuson Fishery Conservation and Management Act ("Magnuson Act"), 16 U.S.C. § 1801 *et seq.*, the Administrative Procedures Act ("APA"), 5 U.S.C. § 551 *et seq.*, 42 U.S.C. § 1981 and the United States Constitution, the Freedom of Information Act ("FOIA"), 5 U.S.C. §§ 552b, the Klamath River Basin Act, PL 99-552, and the Trinity Basin Act, PL 98-541.

In a motion filed on July 16, 1993, plaintiffs sought partial summary judgment on plaintiffs' claims that defendants had violated procedural and substantive requirements of the Magnuson Act (plaintiffs' first cause of action) and that defendants' actions in setting the 1993 season were also in violation of the APA (plaintiffs' second cause of action). Defendants cross-moved for a partial summary judgment affirming their actions in setting the 1993 season. In a preliminary order issued on August 12, 1993, and a detailed order issued on November 3, 1993, 837 F.Supp. 1034, the Court granted summary judgment to defendants except with regard to defendants' decision to increase the spawning escapement floor for Klamath River salmon by 3,000 fish.[2] The Court also granted summary judgment to defendants on plaintiffs'

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[2] In the August 12, 1994 Order, the Court remanded the issue of the increase of the spawning escapement floor to the Secretary of Commerce so he could supplement the Administrative Record. On August 19, 1993, defendants made a submission to this Court in accordance with this Order. Now, eight months later, plaintiffs state that they intend to submit "comments" on the issue. At this point, the issues regarding whether the Secretary of Commerce properly increased minimum spawning escapement in 1993 are moot. Therefore, the Court declines to give plaintiffs an extension of time to respond.

second motion for partial summary judgment, concerning plaintiffs' FOIA claim (plaintiffs' fifth cause of action).

Plaintiffs now seek a partial summary judgment on plaintiffs' remaining claims brought under the Magnuson Act. Plaintiffs seek a summary judgment that there is no federal law reserving fishing rights to the Hoopa Valley and Yurok Indians which must be considered applicable law by Secretary Brown in regulating ocean fisheries under the Magnuson Act, since ocean harvesting by plaintiffs may only be restricted to protect Indian fishing rights established by treaties.[3] Intervenor Sue Masten joined in defendants' opposition to plaintiffs' motion for partial summary judgment on this basis. Plaintiffs also submit in support of their motion for summary judgment the argument that Magnuson Act procedures and National Standards have been violated by defendants' "agreement" to "regulate all ocean seasons in accordance with the Interior Solicitor's opinion." On March 8 and March 14, 1994, respectively, the Humboldt Bay Harbor, Recreation and Conservation District of the State of California, and the State of California, filed briefs as *amicus*

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[3] In the Court's February 1, 1994 Order, we stated that "the *only* issue the Court will consider, in connection with plaintiffs' Motion for Partial Summary Judgment, is whether the Klamath River tribes possess federally reserved rights, such that ocean harvesting may be curtailed by the government to protect such rights under the Magnuson Act. The Court will *not* address, or allow adjudication of, any issue concerning the allocation, amount, or extent of, such rights with respect to any Tribe or plaintiff."

curiae in support of plaintiffs' motion for summary judgment.[4]

Defendants cross-move to dismiss (1) plaintiffs' allegation that the Secretary of the Interior ("Secretary Babbitt") violated constitutional equal protection and due process guarantees as well as 42 U.S.C. § 1981 in setting the 1993 Indian harvest allocation because such allocation was racially based and discriminatory, and (2) plaintiffs' allegation that Secretary Babbitt violated certain acts relating to the restoration of the Klamath and Trinity Rivers. Plaintiffs move to strike several documents that defendants filed with their motion to dismiss. We first address plaintiffs' motion for summary judgment, below.

LEGAL STANDARD:

Defendants' Motion to Dismiss

Dismissal is appropriate under Rule 12(b)(6) when a plaintiff's complaint fails to state a claim upon which relief can be granted. Fed.R.Civ.P. 12(b)(6). The Court must accept as true the factual allegations of the complaint and indulge all reasonable inferences to be drawn from them, construing the complaint in the light most favorable to the plaintiff. *Dodd v. Spokane County*, 393 F.2d 330, 334 (9th Cir.1968); *NL Industries, Inc. v. Kaplan*, 792

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[4] Defendants move to strike or to file a supplemental opposition to the amicus briefs, because the briefs were filed after defendants filed their opposition to plaintiffs' motion for summary judgment. At oral argument, the Court granted defendants' motion to submit an opposition to the amicus briefs.

F.2d 896, 898 (9th Cir.1986). Unless the Court converts the Rule 12(b)(6) motion into a summary judgment motion, the court may not consider material outside of the complaint. *Powe v. Chicago,* 664 F.2d 639, 642 (7th Cir.1981). The Court must construe the complaint liberally, and dismissal should not be granted unless "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Wright and Miller, *supra,* § 1350; *Intake Water Co. v. Yellowstone River Compact Com.,* 769 F.2d 568, 569 (9th Cir.1985).

Plaintiffs' Motion for Summary Judgment

Summary judgment is appropriate when there is no genuine dispute as to material facts and the moving party is entitled to judgment as a matter of law. *Jung v. FMC Corp.,* 755 F.2d 708, 710 (9th Cir.1985); Fed.R.Civ.P. 56. Material facts are those which may affect the outcome of the case. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986). A dispute as to a material fact is "genuine" if there is sufficient evidence for a reasonable jury to return a verdict for the nonmoving party. *Id.* The court may not weigh the evidence, and is required to view the evidence in the light most favorable to the nonmoving party. *Id.*

DISCUSSION:

I. *PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT*

1). *Background.*

The areas that are the Yurok and Hoopa Valley Reservations today were originally set aside in the nineteenth

century. The Act of March 3, 1853, authorized the President to "make . . . reservations . . . in the State of California . . . for Indian purposes." 10 Stat. 226, 238. In 1855, by executive order and under authority of the Act of March 3, 1853, President Pierce established the Klamath River Reservation along the lower 20 miles of the Klamath River. I.C. Kappler, *Indian Affairs: Laws and Treaties* 816 (1904) ("Kappler"). The lands were mostly occupied by Yurok Indians, and the reservation encompassed what is today the lower portion of the Yurok Reservation. According to the Supreme Court in *Mattz v. Arnett*, 412 U.S. 481, 486, 93 S.Ct. 2245, 2248, 37 L.Ed.2d 92 (1973), the site was ideally selected for the Yuroks. They had lived in the area; the arable land, although limited, was "peculiarly adapted to the growth of vegetables," 1856 Report 238, and the river, which ran through a canyon its entire length, abounded in salmon and other fish. *Kappler* at 817.

The original Hoopa Valley Reservation, a 12 mile square on either side of the Trinity River, was first located and proclaimed in 1864, by the Superintendent of Indian Affairs for California, pursuant to legislation enacted that year. The legislation authorized the President to set apart up to four tracts of land in California "for the purposes of Indian reservations, which shall be of suitable extent for the accommodation of the Indians of said state, and shall be located as remote from white settlements as may be found practicable, having due regard to their adaptation to the purposes for which they are intended." Act of April 8, 1864, § 2, 13 Stat. 39, 40 ("1864 Act"); *see also* Kappler at 815; *Donnelly v. United States*, 228 U.S. 243, 255-57, 33 S.Ct. 449, 452-53, 57 L.Ed. 820, *modified on other*

grounds and rehearing denied, 228 U.S. 708, 33 S.Ct. 1024, 57 L.Ed. 1035 (1913); *Mattz v. Superior Court*, 46 Cal.3d 355, 250 Cal.Rptr. 278, 282, 758 P.2d 606, 610 (1988). The reservation was mostly inhabited by Hoopa Indians. In 1876 President Grant formally set aside the reservation by Executive Order "for Indian purposes, as one of the Indian reservations authorized . . . by Act of Congress approved April 8, 1864." *Kappler*, at 815.

In 1891, President Harrison issued an Executive Order extending the Hoopa Valley Reservation along the Klamath River from the mouth of the Trinity River to the Pacific Ocean, thereby encompassing and including the Hoopa Valley Reservation, the original Klamath River Reservation, and the connecting strip in between. *See Mattz v. Arnett*, 412 U.S. at 492-493, 93 S.Ct. at 2251-52.

In 1988 Congress enacted the Hoopa-Yurok Settlement Act of 1988 ("HYSA"), 25 U.S.C. § 1300i-1300i-11. The HYSA partitioned the extended Hoopa Valley Reservation into the present Hoopa Valley Reservation and the Yurok Reservation. The congressional partition "recognized and established" two distinct reservations for the Yurok and Hoopa Valley Tribes ("the Tribes"), and declared that "[t]he unallotted trust land and assets" of each reservation would thereafter be held in trust by the United States for the benefit of the Hoopa Valley and Yurok Tribes, respectively. 25 U.S.C. § 1300i-1(b) & (c). The legislative history accompanying the HYSA indicates that tribal fishing rights constituted one such recognized asset:

> The legislation will also establish and confirm the property interests of the Yurok Tribe in the Extension, including its interest in the fishery,

enabling the Tribe to organize and assume governing authority in the Extension.

See *Partitioning Certain Reservation Lands Between the Hoopa Valley Tribe and the Yurok Indians*, S.Rep. No. 564, 100th Cong., 2d Sess. 2-9 (1988) and Partitioning Certain Reservation Lands Between the Hoopa Valley Tribe and the Yurok Indians, H.Rep. No. 938, pt. 1, 100th Cong., 2d Sess. 8-15 (1988).

The Tribes have historically been dependent on salmon fishery of the Klamath River. One estimate is that prior to settlement along the coast by non-Indians, the Indians in the Klamath River drainage "consumed in excess of 2 million pounds . . . of salmon annually from runs estimated to have exceeded 500,000 fish." U.S. Department of the Interior, Environmental Impact Statement – Indian Fishing Regulations 2 (Hoopa Valley Reservation, California (April 1985)). As the Court noted in *Blake v. Arnett*, 663 F.2d 906, 909 (9th Cir.1981), the fishery was "not much less necessary to the existence of the Indians than the atmosphere they breathed." *See also Mattz v. Arnett*, 412 U.S. at 487, 93 S.Ct. at 2249.

At the time the Hoopa Valley and Klamath River Reservations were created, the United States was well aware of the Indians' dependence upon the fishery. A specific, primary purpose for establishing the reservations was to secure to the Indians the access and right to fish without interference from others. *See Mattz v. Arnett*, 412 U.S. at 487-88, 93 S.Ct. at 2249 (Klamath River Reservation ideal for the Indians because of the river's abundance of salmon and other fish); *Donnelly v. United States*, 228 U.S. at 259, 33 S.Ct. at 453; *United States v. Eberhardt*,

789 F.2d at 1360 (citing *People v. McCovey*, 36 Cal.3d 517, 534, 205 Cal.Rptr. 643, 653, 685 P.2d 687, 697 (1984), *cert. denied California v. McCovey*, 469 U.S. 1062, 105 S.Ct. 544, 83 L.Ed.2d 432 (1984)); *United States v. Wilson*, 611 F.Supp. 813, 817-818 and n. 5 (N.D.Cal.1985) (Hoopa Valley Reservation Indian fishing rights were granted by Congress when it authorized President to create reservations for Indian purposes). *Mattz v. Superior Court*, 46 Cal.3d 355, 250 Cal.Rptr. 278, 290, 758 P.2d 606, 618 (river and Indian fishing played a primary role in the 1891 extension of the Hoopa Valley Reservation to include the old Klamath Reservation and connecting strip).

The power of the United States to reserve fishing rights for Indians and Indian tribes is derived from its plenary power over Indian affairs, grounded in the Indian Commerce Clause and the Interstate Commerce Clause. U.S. Const. Art. I Sec. 8; *see Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 764, 105 S.Ct. 2399, 2402, 85 L.Ed.2d 753 (1985) ("Constitution vests the Federal Government with exclusive authority over relations with Indian tribes.").

The Indians' reliance on fishing continues to this day. As the court noted in *United States v. Wilson*,

> To modern Indians of the Hoopa Valley Reservation, fishing remains a way of life, not only consistent with traditional Indian customs, but also as an eminently practical means of survival in an area which lacks the broad industrial or commercial base which is required to provide its

> population, Indian or otherwise, with predictable, full-time employment and income adequate to provide sufficient quantities and qualities of the necessities of life.

611 F.Supp. at 818 n. 5 (citations omitted).

On October 4, 1993, the Solicitor of the Department of the Interior issued an Opinion concluding that the fishing rights reserved when the reservations were created entitle the Tribes to a share of fishery resources sufficient to support their moderate living needs, but no more than 50% of the harvestable share, unless varied by agreement of the parties. Subsequently, on December 23, 1993, the Secretary of Commerce published an interpretative rule, which states that the Secretary recognizes that the Federally reserved fishing rights of the Yurok and Hoopa Valley Tribes, as construed in the Solicitor's Opinion, are applicable law for the purposes of the Magnuson Act. 58 Fed.Reg. 68063 (December 23, 1993). The Federal Register notice states that all future fishery management measures for the ocean salmon fisheries off Washington, Oregon and California must provide for harvest allocations as provided for in the Solicitor's Opinion:

> The [fishery management plan (FMP)] specifies that, to the maximum extent possible, optimum yield will be set at a level that fulfills the requirements of the Indian fishery for salmon on the Klamath River and that the Council must take the effects of in-river harvest on spawner escapement into account while setting ocean harvest levels. . . . The Solicitor's Opinion now provides a clear legal framework for allocating the salmon harvest between the Tribes and various other in-river and ocean commercial and

> recreational fishermen. . . . The Secretary will only approve ocean salmon management measures recommended by the Council that provide for tribal harvest opportunity consistent with the rights recognized in the Solicitor's Opinion and meet the spawning escapement goal for Klamath River fall chinook salmon.

58 Fed.Reg. 68063.

The rule amends the Appendix to 50 CFR Part 661, which is the framework amendment for annual management measures by including therein direction to consider as applicable law the construction of the rights provided in the Solicitor's Opinion. This amendment applied to the 1994 management measures developed by the Pacific Fishery Management Council. On January 3, 1994, the Assistant Secretary, Indian Affairs, formally instructed the Sacramento Area Director, Bureau of Indian Affairs, to implement the Solicitor's Opinion in regulating the on-reservation tribal fishery beginning in 1994.

2). *Applicable Law*

Standard of Review

Plaintiffs challenge Commerce's action in applying, as "applicable law" under the Magnuson Act, the construction of law set forth in the Solicitor's Opinion. Enacted in 1976, the Magnuson Act was intended to respond to overfishing and inadequate conservation measures which were threatening future commercial and recreational fishing, as well as the very survival of species. 16 U.S.C. § 1801(a); *Lovgren v. Byrne*, 787 F.2d 857, 861 (3rd Cir.1986) (Magnuson Act "was enacted at a time

when overfishing of coastal waters was commonplace, threatening the existence of a number of species of fish"); *Pacific Coast Federation of Fisherman's Assoc. v. Secretary of Commerce*, 494 F.Supp. 626 at 635, n. 7 (N.D.Cal.1980) ("over-fishing of species was a primary impetus to passage of the Act").

The Act provides for the establishment of regional Councils which are charged with developing, after public comment, a recommended fishery management plan ("FMP") for regulating fishing in the EEZ. 16 U.S.C. § 1852. The Councils also recommend seasonal adjustments and amendments to the FMP. *Id.* The Council's recommendations are submitted to the Secretary of Commerce who reviews them for consistency with seven "National Standards" set forth in the Act and "other applicable law." Based on this review, the Secretary may either approve or disapprove the Council's recommendations. 16 U.S.C. § 1854; *Eberhardt*, 789 F.2d 1354 at 1363 (Councils "recommend" ocean fishing regulations to the Department of Commerce).

An action taken by the Secretary of Commerce under the Magnuson Act is subject to limited judicial review, 16 U.S.C. § 1855(b), and may only be invalidated if the challenged action is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A) (1982). We review legal questions under a *de novo* standard. We also note that the Department of the Interior has been given authority under 25 U.S.C. §§ 2 and 9 to manage and conserve Indian resources, and we must assume that the Department has been given reasonable power to effectively discharge its broad responsibilities for the management of Indian

affairs. *United States v. Eberhardt*, 789 F.2d at 1354; *Udall v. Littell*, 366 F.2d 668, 672 (D.C.Cir.1966).

3). *Discussion*

Fishing Rights of the Tribes

Plaintiffs first move for partial summary judgment that there is no federal law reserving fishing rights to the Hoopa Valley and Yurok Indians which must be considered applicable law by the Secretary of Commerce in regulating ocean fisheries, since ocean harvesting by plaintiffs may only be restricted pursuant to treaty-based Indian fishing rights. Plaintiffs essentially make three different arguments: (1) that the Hoopa Valley and Yurok Tribes have no federally reserved fishing rights; (2) that fishing rights secured by executive or statutory authority do not command the same authority as rights secured by treaty; and (3) that there can be no off-reservation regulation pursuant to an on-reservation fishing right. The Court will address these arguments in turn.

(i) *Federally Reserved Fishing Rights*

Plaintiffs first argue that the Hoopa Valley and Yurok Indians have no fishing rights because the establishment of their reservations did not "create any fishing rights at all." However, while the Hoopa Valley and Yurok Indians do not have any treaty based fishing rights, courts have consistently recognized that the federal government reserved Indian fishing rights when it established what are the Hoopa Valley and Yurok Reservations of today.

The Ninth Circuit held in *United States v. Eberhardt* that the Yurok and Hoopa Valley Indians have reserved fishing rights:

> The right to take fish from the Klamath River was reserved to the Indians when the reservation was created. . . . [T]he right reserved includes fishing for ceremonial, subsistence and commercial purposes.

789 F.2d at 1359.

In *People v. McCovey*, the Supreme Court of California held that "[Indian fishing] rights were granted by Congress when it authorized the President to create the reservation for Indian purposes." 205 Cal.Rptr. at 653, 685 P.2d at 697. Further, the Northern District of California has previously confirmed the Yurok and Hoopa Valley Indians' right to fish:

> It cannot be doubted that the Indians have a right to fish on the reservation. Congress has carefully preserved this right over the years, and he Courts have consistently enforced it. The Supreme Court has held that the creation of a reservation "for Indian purposes" encompasses the right to hunt and fish on that reservation. [citing *Menominee Tribe of Indians v. U.S.*, 391 U.S. 404, 405, 88 S.Ct. 1705, 1707, 20 L.Ed.2d 697 (1968)].

Pacific Coast Federation of Fishermen's Asso. v. Secretary of Commerce, 494 F.Supp. 626, 632 (N.D.Cal.1980). *See also, Mattz v. Superior Court*, 46 Cal.3d 355, 250 Cal.Rptr. 278, 758 P.2d 606 (1988) (right to take fish from the Klamath River was reserved for the Indians when the reservation was created); *Arnett v. Five Gill Nets*, 48 Cal.App.3d 454, 121 Cal.Rptr. 906 (1975); *cert. denied*, 425 U.S. 907, 96 S.Ct.

1500, 47 L.Ed.2d 757 (1976) (same); *Donahue v. California Justice Court*, 15 Cal.App.3d 557, 93 Cal.Rptr. 310 (1971) (same).[5]

Plaintiffs also contend that, even if there are fishing rights, they were not vested "in any particular tribe" when the reservations were set aside in the 19th century. While this is true, this was altered by the HYSA, which specifically vested fishing rights in the Yurok and Hoopa Valley Tribe in 1988. Pursuant to this law, the Yurok and Hoopa Valley Tribes have a federally reserved fishing right which includes fishing for ceremonial, subsistence and commercial purposes. *See* discussion of HYSA, above.[6] Thus, the Hoopa Valley and Yurok Indians clearly have a federally reserved fishing right.

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[5] Plaintiffs ignore these cases except *Eberhardt*, which they characterize as upholding an Interior regulation prohibiting Indian fishing for commercial purposes because the fishing rights involved were not treaty rights. However, *Eberhardt* does not concern the issue of treaty rights. Rather, the issue before the court in *Eberhardt* was whether the Secretary of the Interior had any authority, absent evidence of the "imminent extinction" of the fishery resource, to ban Indian commercial fishing on-reservation. *Eberhardt*, 789 F.2d at 1358. The Ninth Circuit held that, even absent such a showing, such regulation "to protect and conserve the fishery resource for the benefit of the Indians," was not an abrogation of what the Court clearly held to be a well-established right to fish. *Id.* at 1359.

[6] While plaintiffs imply that because this right was not vested before 1988, it may not be enforced by restricting ocean fisheries, Indian property rights which are not vested as against congressional action are still protected and enforceable against third parties such as plaintiffs. *See F. Cohen's Handbook of Federal Indian Law*, 486-99 (R. Strickland ed. 1982) (tribal rights of occupancy afford the tribe enforceable property right against all but the federal government).

(ii) *Treaty Versus Non-Treaty Rights*

Plaintiffs' second argument is that only tribes with treaty rights should be accorded the power to regulate fishing off-reservation. This contention lacks merit. The federal power to reserve rights for Indians in conjunction with the creation of reservations may be exercised either through treaties, statutes, or executive actions pursuant to statutory authority. Court decisions upholding or recognizing the reserved fishing rights at issue have uniformly rejected a treaty versus non-treaty distinction. The Ninth Circuit addressed this very issue in *Blake v. Arnett*:

> Congress can create a reservation, reserve rights to the Indians, and dispose of the lands of the United States by statute as well as by treaty . . .
>
> * * *
>
> We do not think that the distinction between a treaty and a statute has great significance.
>
> * * *
>
> [B]oth treaties and statutes are the supreme law of the land. Const. Art. VI. cl. 2. . . . [W]e believe that whether the source of a right is in a treaty or in a statute has little contemporary relevance.

663 F.2d at 909-910 (citation omitted). *See also United States v. Wilson*, 611 F.Supp. at 818 ("It makes little practical difference that Congress granted these rights by statute rather than by treaty"); *Arnett v. Five Gill Nets*, 48 Cal.App.3d at 459, 121 Cal.Rptr. at 911 ("No reason appears why the manner in which the right was granted would make it more or less worthy of protection");

McCovey, 205 Cal.Rptr. at 652-53, 685 P.2d at 696-97.[7] *See also Arizona v. California*, 373 U.S. 546 at 598, 83 S.Ct. 1468, 1496, 10 L.Ed.2d 542 (1963) ("We can give but short shrift . . . to the argument that the reservations either of land or water are invalid because they were originally set apart by the Executive") (water rights); *United States v. Walker River Irrigation District*, 104 F.2d 334, 336 (9th Cir.1939) ("We see no reason to believe that the intention to reserve need by evidenced by treaty or agreement. A statute or an executive order setting apart the reservation may be equally indicative of the intent.") (water rights).

(iii) *On-Reservation Versus Off-Reservation Rights*

Plaintiffs next argument concerns the scope of any fishing rights that the Tribes may possess. Plaintiffs contend that the Tribes' only right is an on-reservation right

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[7] In response to California's petition for Supreme Court review of *Arnett v. Five Gill Nets*, Solicitor General Bork's brief for the United States noted:

> That executive orders played a prominent role in the creation of the Reservation does not change this result [that the United States reserved to the Indians the right to fish on the Reservation without state interference]. Regardless of the manner in which a reservation is created the purpose is generally the same: to create a federally-protected refuge for the tribe. . . .
>
> With respect to fishing rights we see no reason why a reservation validly established by executive order should be treated differently from other reservations.

Memorandum for the United States as Amicus Curiae, at 5, *Arnett v. Five Gill Nets*, (U.S. No. 75-527), *cert. denied*, 425 U.S. 907, 96 S.Ct. 1500, 47 L.Ed.2d 757 (1976).

of access to the Klamath River and an on-reservation immunity from state regulation of fishing and that the Department of Commerce cannot regulate catch outside of the reservation to protect fish for the Tribes on reservation. However, plaintiffs do not provide any authority for their contention that the Tribes' fishing right is limited in this way.

As anadromous fish, Klamath River chinook do not live out their existence on the reservation. They spawn in the upper reaches of the Basin, migrate as juveniles to the ocean where they reach adult and harvestable size, and return to the river of their origin to spawn. Only when they return to the reservation are the fish of any value to the Tribes. A federally reserved fishing right is a right to an opportunity to obtain possession of a portion of the resource, which can best be expressed by either the numbers of fish taken or an allocation of the harvestable resource. *See United States v. Washington*, 520 F.2d 676, 687 (9th Cir.1975), *cert. denied*, 423 U.S. 1086, 96 S.Ct. 877, 47 L.Ed.2d 97 (1976); *Puget Sound Gillnetters Ass'n v. U.S. Dist. Ct.*, 573 F.2d 1123, 1129 n. 6 (9th Cir.1978), *affirmed in part and vacated in part, Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 99 S.Ct. 3055, 61 L.Ed.2d 823 (1979). Thus, for the Tribes' federally reserved fishing right to have any practical meaning, it must include regulation of activities occurring outside the reservation which negatively impact that right.

While the off-reservation regulation of fishery pursuant to non-treaty based tribal fishing rights appears to be a matter of first impression, it is clear that courts have upheld off-reservation regulation of fishery pursuant to

treaty based fishing rights.[8] For example, courts have held that fishing activities outside of tribal fishing areas of the Pacific Northwest Tribes must be regulated to permit a sufficient return of the fishery resource to tribal fishing areas so that these tribes may have a meaningful opportunity to harvest their share of the resource. *See, e.g., Hoh Indian Tribe v. Baldrige*, 522 F.Supp. 683, 687 (W.D.Wash.1981) (the State cannot so manage the fishery that little or no harvestable portion of the fish reaches the Indian fishing areas; the Magnuson Act clearly places a responsibility on the United States to police ocean fishery by Washington citizens insofar as is necessary to assure compliance with the treaties); *U.S. v. Washington*, 459 F.Supp. 1020, 1070 (W.D.Wash.1978) (same); *Sohappy v. Smith*, 302 F.Supp. 899, 911 (D.C.Or.1969) (same). That the fishing rights in these cases arose through treaty rather than through statutory and executive authority does not affect the scope of the fishing right, as explained above.[9]

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[8] Contrary to plaintiffs' assertions, the fact that fulfilling a reserved tribal right may require regulation of activities outside the areas where the tribal right is enjoyed does not render the right an "off-reservation" right.

[9] The cases plaintiffs cite to support their argument that only fishing rights provided through treaty may affect regulation of fishery off-reservation do not support that proposition. For example, plaintiffs rely upon *Wahkiakum Band of Chinook Indians v. Bateman*, 655 F.2d 176 (9th Cir.1981), and *United States v. Oregon*, 787 F.Supp. 1557 (D.Or.1992), for authority. At issue in both cases were tribes seeking to be declared successors in interest to signatories of various treaties, which has no relevance to the instant case. Plaintiffs also cite *United States v. Forty-Eight Pounds of Rising Star Tea*, 35 F. 403 (D.C.N.D.Cal.1888), *aff'd*, 38 F. 400 (C.C.N.D.1889) as authority. This case describes how a reservation was extended to include a

Further authority for the proposition that a reserved right can affect off-reservation rights in order to satisfy the tribal on-reservation right comes from the context of water rights cases. In *Winters v. United States*, 207 U.S. 564, 576, 28 S.Ct. 207, 211, 52 L.Ed. 340 (1908), the Court found an implied off-reservation restriction of water because it was necessary to fulfill the needs of on-reservation use and because the land of the reservation would have been valueless without water. *See also Arizona v. California*, 373 U.S. 546, 599, 83 S.Ct. 1468, 1497, 10 L.Ed.2d 542 (1963) (implied restriction found off-reservation where water essential to "life of the Indian people"); *Colville Confederated Tribes v. Walton*, 647 F.2d 42, 47 (9th Cir.1981) (Congress has the power to reserve off-reservation water for use on-reservation because "Congress intended to deal fairly with the Indians by reserving waters without which their lands would be useless.")

The fishery here, no less than the water in the water rights cases, has been deemed "essential to the life of the Indian people" for whom the reservation was created. *Arizona*, 373 U.S. at 599, 83 S.Ct. at 1497. Further, here, as with the Pacific Northwest treaty tribes, the Government has "recognized the vital importance of the fisheries to the Indians and wanted to protect them from the risk that non-Indian settlers might seek to monopolize their fisheries." *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 666, 99 S.Ct. 3055,

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fishing cannery so that it would not compete with the reservation fishery, and does not stand for the proposition that Indians with fishing rights through statutory or executive authority can only be helped on-reservation.

3064, 61 L.Ed.2d 823 (1979). The Court is also mindful that "[t]he United States, acting through the Secretary of the Interior, has charged itself with moral obligations of the highest responsibility and trust [towards reservation Indians]." *Pyramid Lake Paiute Tribe of Indians v. Morton*, 354 F.Supp. 252, 256-257 (D.D.C.1972). Thus, it appears entirely appropriate to the Court that this responsibility include the Department of Commerce's regulation of the ocean harvest of Klamath River salmon in order to provide the appropriate measure of the fishing rights of the Hoopa Valley and Yurok Tribes.

(iv). *Magnuson Act Procedures and National Standards*

Plaintiffs also argue in support of their motion for partial summary judgment that Magnuson Act procedures and National Standards have been violated by the "agreement" between the Secretaries of Commerce and the Interior to "regulate all ocean seasons in accordance with the Interior Solicitor's Opinion." While plaintiffs make this argument in their opening brief, they drop it in their reply, leading the Court to conclude that they accept defendants' correction of their interpretation of the Magnuson Act and its National Standards. Further, plaintiffs' argument appears directed at challenging defendants' decision to allocate a 1993 harvest of 18,500 fall chinook salmon for in-river Indian fishery. The Court specifically stated it would not adjudicate the validity of any allocation on this motion in its order of February 1, 1994. Nonetheless, the Court addresses plaintiffs' allegations here insofar as it is desirable to lend clarity to the record.

Plaintiffs first allege that Commerce's management of the ocean fishery so as to accommodate Interior's allocation to the Tribes constituted an improper delegation of power from the Department of Commerce to the Interior, because the "Secretary of the Interior, (and his Solicitor) has no statutory role in the establishment of fishery management plans under the FCMA." This contention of plaintiffs is grounded in a misunderstanding of the Magnuson Act.

The Magnuson Act, and its National Standards, 16 U.S.C., § 1801 *et seq.*, apply to regulation of ocean harvesting in the Exclusive Economic Zone – the area from 3-200 miles seaward – and not to in-river fisheries. *See Pacific Coast Fed. v. Secretary of Commerce*, 494 F.Supp. 626, 631-633 (N.D.Cal.1980) (rejecting plaintiffs' claim that the Council and the Secretary of Commerce should regulate in-river fisheries, and holding that the Secretary of Commerce had no jurisdiction over the "inland fisheries.") *See also* the Court's November 2, 1993 Order at 14: "the rivers running through the reservations are under the jurisdiction of the Department of the Interior."

Nonetheless, the Secretary of Commerce must manage the ocean fishery in a manner consistent "with any other applicable law," 16 U.S.C. § 1854(a)(1)(B) which, as we stated in our November 3, 1993 Order, we construe as including United States obligations to Indian reservations with respect to fishing rights. This is also acknowledged in the Fishery Management Plan ("FMP") for the affected area, which requires that any optimum yield for the ocean fishery must take into account the Indian fishery on the Klamath River. Therefore, the Secretary of Commerce's action in setting the 1993 allocation simply followed the

Solicitor's Opinion defining the applicable law. This was not an improper delegation of power of Commerce to the Interior, as plaintiffs suggest.

Plaintiffs also contend that Defendants' actions are in violation of "applicable procedural requirements" of the Magnuson Act, and for support refer to their first motion for summary judgment under the Magnuson Act. The procedural claims plaintiffs raised in their first motion were already ruled upon by this Court in our previous orders and plaintiffs cannot seek to review them here.

In sum, plaintiffs fail to show that they are entitled to judgment as a matter of law that an allocation of fish from ocean fisheries to the Hoopa Valley and Yurok Tribes, as "non-treaty tribes," is unlawful. Accordingly, the Court dismisses plaintiffs' remaining claims under the Magnuson Act (plaintiffs' first cause of action), and denies plaintiffs' motion for partial summary judgment.

II. *PLAINTIFFS' MOTION TO STRIKE*

Plaintiffs move to strike three of defendants' exhibits appended to defendants' motion to dismiss, on the basis that these exhibits are "outside the pleadings." However, these exhibits were not submitted by defendants to prove factual matters outside the averments of the Amended Complaint. The Exhibits plaintiffs seek to strike are Bureau of Indian Affairs Public Notices and a BIA Federal Register Notice, all of which were issued pursuant to 25 CFR 250.12(a). Exhibit 2 is a notice in the nature of an interpretative rule, defining the eligibility criteria for Indian fishing on the Yurok and Hoopa Valley reservations, to bring these criteria into conformity with the

Hoopa-Yurok Settlement Act (HYSA), 25 U.S.C. § 1300i *et seq.*[10] Exhibits 3 and 4 are notices setting the 1993 harvest allocation for the Indian in-river fishery.

Thus, these Exhibits constitute either applicable law, or adjudicative facts subject to judicial notice pursuant to F.R.E. 201, since they are outside of reasonable controversy. As a result, the Court denies plaintiffs' motion to strike defendants' exhibits.

III. *DEFENDANTS' MOTION TO DISMISS*

Defendants first move to dismiss the claims which form the balance of plaintiffs' second, third, and fourth causes of action, which allege Secretary Babbitt's 1993 in-river fishery allocation for the Hoopa Valley and Yurok Tribes are discriminatory and violate due process. These

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[10] Plaintiffs specifically attack Exhibit 2, asserting that there has been "no properly adopted amendment of the C.F.R. in question," presumably meaning that the BIA change in the regulations should have been issued with notice and comment. However, interpretative regulations such as this notice do not require notice and comment proceedings. Assuming that Exhibit 2 is not "properly adopted," plaintiffs attack the superseded regulation as defining "eligible Indian" to include not only tribal members but other persons, and claim this is racially discriminatory. However, as discussed below, classification on the basis of "Indian" status is neither racially discriminatory nor constitutionally impermissible. Further, federal law permits in limited circumstances recognition of certain Indians who demonstrate a sufficient nexus to Indian tribes. *See* 25 U.S.C. 479. In some circumstances such criteria that includes racial factors is not considered impermissible. *See Alaska Chapter, Associated General Contractors of America v. Pierce*, 694 F.2d 1162, 1168 (9th Cir.1982).

causes of action involve 1) claims of Fifth Amendment and equal protection 42 U.S.C. § 1981 violations, and 2) claims of Fifth Amendment due process violations. Defendants also move to dismiss the claims which constitute plaintiffs' sixth cause of action, which alleges that Secretary Babbitt has violated the Klamath and Trinity River Acts. The Court will address these claims in turn.

1). *Equal Protection and 42 U.S.C. § 1981 Claims*

Plaintiffs charge that the Secretary's authorization of a harvest of 18,500 fall chinook for the 1993 season was racially discriminatory, and violated the equal protection clause and 42 U.S.C. § 1981.[11] In order to succeed on either cause of action, plaintiffs must be able to allege racial discrimination as an element of their claim. *General Building Contractors Ass'n v. Pennsylvania*, 458 U.S. 375, 391, 102 S.Ct. 3141, 3150, 73 L.Ed.2d 835 (1982) ("[42 U.S.C.] 1981, like the Equal Protection Clause, can be violated only by

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[11] The Fourteenth Amendment to the U.S. Constitution provides that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const.Amend. XIV. The due process clause of the Fifth Amendment imposes on the federal government the limitations that the equal protection clause of the Fourteenth Amendment imposes on the states. *Richards v. Secretary of State, Dept. of State*, 752 F.2d 1413, 1415 n. 1 (9th Cir.1985). The Civil Rights Act provides for equal rights under the law, and states that "[a]ll persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts . . . and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens . . . " 42 U.S.C. § 1981.

purposeful discrimination.") However, plaintiffs fail to allege any cognizable claim of racial discrimination.

Plaintiffs allege that the allocations are racially based and discriminatory because "none of the tribes of said Indians have any treaty with the United States and some "Indians" are not tribal members." However, regulations regarding Indians are not considered "racial," regardless of whether the Indians in question are affiliated with treaty tribes.

Indians enjoy a "unique legal status," *Morton v. Mancari*, 417 U.S. 535, 94 S.Ct. 2474, 41 L.Ed.2d 290 (1974), which derives from the Constitution through the "Indian Commerce Clause," Article I, Sec. 8, cl. 3, which provides Congress with the power to "regulate Commerce . . . with the Indian Tribes," through Article II, Sec. 2, cl. 2, the treaty-making power, and from the special relationship between the Federal government and Indians. *Id.* at 552, 94 S.Ct. at 2483.

> Literally every piece of legislation dealing with Indian tribes and reservations . . . single out for special treatment a constituency of tribal Indians living on or near reservations. If these laws, derived from historical relationships and explicitly designed to help only Indians, were deemed invidious racial discrimination, an entire Title of the United States Code (25 U.S.C.) would be effectively erased and the solemn commitment of the Government toward the Indians would be jeopardized. *Id.* at 552, 94 S.Ct. at 2483-84.

In *Mancari*, the Court explained that a Bureau of Indian Affairs Indian employment preference was not "racial"

because it was granted to Indians "not as a discrete racial group, but, rather, as members of quasi-sovereign tribal entities." *Id.* at 554, 94 S.Ct. at 2484.[12]The Court further held that "[a]s long as the special treatment can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians," the regulation will not be disturbed. *Id.* at 555, 94 S.Ct. at 2485.

The Supreme Court revisited the question whether regulation of Indian affairs was racially based in *United States v. Antelope*, 430 U.S. 641, 97 S.Ct. 1395, 51 L.Ed.2d 701 (1977). Addressing a challenge that a federal criminal statute applied to Indians was racially discriminatory, the Court held that:

> [S]uch regulation is rooted in the unique status of Indians as "a separate people" with their own political institutions. Federal regulation of Indian tribes, therefore, is governance of once-sovereign political communities; it is not to be viewed as legislation of a " 'racial' group consisting of 'Indian'. . . . *Morton v. Mancari, supra*, 417 U.S. at 553 n. 24, 94 S.Ct. at 2484 n. 24.

The regulation in this case restricts on-reservation fall chinook tribal harvest based on the existence of federally-recognized Tribes and their respective reservations, and not on any "racial" classification. All Indians who are authorized by the Secretary to fish on the Hoopa Valley or Yurok reservations in 1993 had to be members of either

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[12] In fact, the Court noted that the preference, applying only to members of federally recognized tribes, operated to exclude many people racially classified as Indian. *Mancari* at 553 n. 24, 94 S.Ct. at 2484 n. 24.

Hoopa Valley or Yurok Tribes.[13] Thus, under the rule of *Mancari*, the regulation is not racially based, but is based on the political status of the Tribes.

Plaintiffs argue that because these Tribes are not parties to treaties with the United States, the allocation is racially based. However, courts have applied the rule set forth in Mancari in both treaty and non-treaty situations. *See Alaska Chapter, Assoc. Gen'l Contractors of America, Inc.*, 694 F.2d at 1168-1170 (applying the rule of *Mancari* to contract award preference for Indian-owned businesses in Alaska, where the treaty power does not apply, and under a statutory definition of "Indian" which involved classification based on blood quantum and recognition by a tribal or governmental entity); *Barona Group of Capitan Grande Band of Mission Indians v. American Mgmt. and Amusement*, 824 F.2d 710, 722-723 (9th Cir.1987) (*Mancari* rule applied in case involving 25 U.S.C. 81, which applies to all tribes).

Plaintiffs do not cite a single case to support their claim that the fishery allocation presents a cognizable § 1981 or equal protection claim. Plaintiffs' entire opposition to defendants' motion on the issue of racial classification consists of their motion to strike, which the Court denies. Since it appears beyond doubt that plaintiffs can

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[13] Prior to the 1988 Hoopa-Yurok Settlement Act, 25 U.S.C. 1300i *et seq.*, eligibility to participate in the on-reservation Indian fishery was based on the criteria stated at 25 C.F.R. 250.5. In 1992, in order to conform the eligibility criteria to the Settlement Act, the Bureau of Indian Affairs, (BIA) issued a notice changing the criteria stated at 25 C.F.R. Part 250 to *require membership* in either the Hoopa Valley or Yurok Tribes. *See* defendants' Exhibit 2.

prove no set of facts in support of their equal protection and § 1981 claims which would entitle them to relief, these claims are dismissed.

2). *Due Process Claims*

Plaintiffs' due process argument is that they have a right of access to "federal ocean fisheries" under the Magnuson Act and that they were deprived of this right without notice or a hearing before issuance of defendants' 1993 harvest regulations.[14] As this Court has previously noted, the Magnuson Act was enacted in response to the overfishing of ocean stock which was threatening commercial and recreational fisheries, as well as the very survival of some species. 16 U.S.C. 1801(a). To accomplish the goals of the Magnuson Act, Congress established an "exclusive economic zone," ("EEZ"), within which the Department of Commerce would exercise jurisdiction. 16 U.S.C. 1811(a).

Thus, the Magnuson Act confers on the Secretary of Commerce authority to manage the fishery resources in the EEZ for conservation. It does not confer on commercial fishermen any right or title in the fishery resources under the Department of Commerce's authority. Plaintiffs

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[14] The Fifth Amendment to the U.S. Constitution provides that "[n]o person shall . . . be deprived of life, liberty or property, without due process of law. . . . " U.S. Const.Amend V. Discrimination that is "so unjustifiable as to be violative of due process," is considered to be within the Fifth Amendment concept of due process. *Bolling v. Sharpe*, 347 U.S. 497, 499, 74 S.Ct. 693, 694, 98 L.Ed. 884 (1954).

do not point to any language in the Magnuson Act showing Congressional intent that the fishing privileges that may be afforded under the Act to ocean users of the fishery resource vests in them a property right protected by the Fifth Amendment.

Further, plaintiffs can have no property right in the migratory fish themselves. *See Douglas v. Seacoast Products, Inc.*, 431 U.S. 265, 284, 97 S.Ct. 1740, 1751, 52 L.Ed.2d 304 (1977) ("it is pure fantasy to talk of 'owning' wild fish, birds, or animals.") In addition, plaintiffs have no right to fish which implicates property interests, nor do they have any legitimate claim of entitlement. While they may have an expectation of participation, "a unilateral expectation" of a benefit is insufficient to establish a property interest. *Board of Regents v. Roth*, 408 U.S. 564, 577, 92 S.Ct. 2701, 2709, 33 L.Ed.2d 548 (1972).

Plaintiffs' entire written argument in opposition to defendants' motion to dismiss their due process claim consists of their motion to strike and one footnote asserting that *Vietnamese Fishermen Ass'n of America, et al. v. California Department of Fish & Game, et al.*, 816 F.Supp. 1468 (N.D.Cal.1993) recognizes that fishermen have a property right to fish. However, as plaintiffs conceded at oral argument, that proposition is nowhere stated in that case. Again, since it appears beyond doubt that plaintiffs can prove no set of facts in support of their due process claim which would entitle them to relief, these claims are dismissed. Thus, the Court dismisses plaintiffs' second, third, and fourth causes of action.

3). *Restoration of the Klamath and Trinity Rivers Claims*

The second category of claims defendants seek to dismiss are those involving alleged violations of two statutes which provide for restoration of the Klamath and Trinity Rivers. (plaintiffs' sixth cause of action). Plaintiffs assert in this regard that Defendant Babbitt has failed to comply with his restoration responsibilities and has failed to regulate in-river fishing to protect the fishery.

A). *Standing*

First, defendants move to dismiss these claims because plaintiffs lack standing, since they have not alleged that they have suffered or will suffer a concrete injury. Article III of the Constitution limits the judicial power of federal district courts to "cases and controversies."

> It is not enough that a litigant claims that a violation of federal law has occurred; the litigant must have "standing" to invoke the power of a federal court.

Fernandez v. Brock, 840 F.2d 622, 625 (9th Cir.1988). To establish standing under Article III, a plaintiff must allege three elements. First, the plaintiff must have suffered an "injury in fact" – an invasion of a legally protected interest which is (a) concrete and particularized, *Warth v. Seldin*, 422 U.S. 490, 508, 95 S.Ct. 2197, 2210, 45 L.Ed.2d 343 (1975), and (b) "actual or imminent, not 'conjectural' or 'hypothetical,' " *Whitmore v. Arkansas*, 495 U.S. 149, 155, 110 S.Ct. 1717, 1723, 109 L.Ed.2d 135 (1990). Second, there must be a causal connection between the

injury and the conduct complained of – the injury has to be "fairly . . . trace[able] to the challenged action of some third party not before the court." *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 41-42, 96 S.Ct. 1917, 1926, 48 L.Ed.2d 450 (1976). Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision." *Lujan v. Defenders of Wildlife*, ___ U.S. ___, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992).

The party invoking federal jurisdiction bears the burden of establishing these elements. *Id.* At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we "presum[e] that general allegations embrace those specific facts that are necessary to support the claim," *Lujan v. National Wildlife Federation*, 497 U.S. 871, 889, 110 S.Ct. 3177, 3189, 111 L.Ed.2d 695 (1990).

Given the low threshold plaintiffs must pass to survive a motion to dismiss, plaintiffs' allegations satisfy the first requirement to show standing. In the complaint, plaintiffs allege the following: that they have been "severely impacted" by "defendants' actions"; that defendants Babbitt and the Department of the Interior are charged with restoring and maintaining fish runs in the Klamath; that the status of the Klamath River runs is the direct result of the failure and refusal by Secretary Babbitt to improve and protect the habitat and restore runs by stocking fish; and that defendants have failed and refused to protect Klamath River runs.

These pleadings suffice to allege injury, since the Court understands the complaint to allege that plaintiffs

have suffered decreased fishing opportunity as a result of defendants' inaction, although this is not explicit in the complaint.[15] Further, because on a motion to dismiss we "presum[e] that general allegations embrace those specific facts that are necessary to support the claim," *Lujan v. National Wildlife Federation*, 497 U.S. at 889, 110 S.Ct. at 3189, the Court finds that plaintiffs successfully plead that their decreased fishing opportunity is caused by the conditions which the Acts seek to address, and that the relief they seek – an order directing defendants to implement measures to improve Klamath River runs – will likely redress their injury. Thus, the Court denies defendants' motion to dismiss plaintiffs' claims on the ground that plaintiffs do not successfully allege standing.

B). *Judicial Review*

Although the Court finds that plaintiffs successfully allege standing, plaintiffs do not successfully allege a basis for judicial review. Neither the Klamath Basin Act nor the Trinity Basin Act (the "Acts") contain provisions

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[15] In their written brief, plaintiffs misstate the test that must be met to allege injury in order to show standing. Plaintiffs argue that because they fall within the "zone of interests" Congress intended to protect through the Klamath and Trinity Acts, they are injured parties whose interests these acts are designed to protect. However, plaintiffs are confusing prudential considerations regarding a "zone of interests" with the constitutional Article III requirement of injury. Establishing Article III standing is a precursor to addressing prudential considerations. *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150, 153, 90 S.Ct. 827, 829, 25 L.Ed.2d 184 (1970).

granting a private right of action. Plaintiffs seek judicial review pursuant to the Administrative Procedure Act ("APA"), or, in the alternative, assert there to be an implied private right of action in the Acts.

i). *Judicial Review Under the APA.*

Plaintiffs have generally alleged jurisdiction under the APA, 5 U.S.C. § 551 *et seq.* When jurisdiction is alleged pursuant to the APA, a plaintiff can claim a right to judicial review under § 10(a) of the APA, which provides: A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. 5 U.S.C. § 702. This provision contains two separate requirements. First, the person claiming a right to sue must identify some "agency action" that affects her in the specified fashion. *Lujan v. National Wildlife Federation*, 497 U.S. 871, 881-82, 110 S.Ct. 3177, 3185, 111 L.Ed.2d 695 (1990). Second, the party must show she has suffered legal wrong, or has been adversely affected or aggrieved by that action. *Id.*

Plaintiffs' complaint refers to no specific action or inaction that violates the Acts, but only generally states that Secretary Babbitt has failed to implement measures to improve Klamath River Runs, including habitat improvement and fish planting measures. Plaintiffs do not attempt to meet the test laid out in *Lujan*. Rather, according to plaintiffs, because they allege general agency *inaction*, review is available under 5 U.S.C. § 706(1) which authorizes a district court to "compel agency action *unlawfully withheld or unreasonably delayed*" (emphasis added).

However, the claims plaintiffs present here do not match what is required to invoke 5 U.S.C. § 706(1). Courts which have reviewed claims of delay pursuant to this provision have done so in the context of specific allegations of inaction, usually in the context of delayed administrative review of a plaintiff's claim before an agency, or of delayed agency rulemaking. *See Telecommunications Research & Action v. F.C.C.*, 750 F.2d 70 (D.C.Cir.1984), *Public Citizen Health Research Group v. Comm'r Food and Drug Admin.*, 740 F.2d 21 (D.C.Cir.1984). Plaintiffs do not point to any authority to support their position that 5 U.S.C. § 706(1) can be utilized to review the kind of claim of agency inaction here made by plaintiffs.

ii). *Implied Private Right of Action.*

Plaintiffs alternatively contend that the Acts contain an implicit private right of action. Whether the Acts confer a private right of action is determined by the four-part test announced by the Supreme Court in *Cort v. Ash*, 422 U.S. 66, 78, 95 S.Ct. 2080, 2087, 45 L.Ed.2d 26 (1975): (i) the plaintiff must belong to the class for whose *especial* benefit the statute was created; (ii) the legislature must have shown an intent, either explicitly or implicitly, to create a private remedy; (iii) finding an implied cause of action must be consistent with the underlying purposes of the statute; and (iv) the cause of action must not be one that has traditionally been left to state law. An evaluation of the other elements is not necessary if the Court finds that Congress did not intend to create a private cause of action. *See California v. Sierra Club*, 451 U.S. 287, 298, 101

S.Ct. 1775, 1781, 68 L.Ed.2d 101 (1981); *Stupy v. Postal Service*, 951 F.2d 1079, 1081 (9th Cir.1991).

There is no indication that Congress intended the Acts to provide a basis for a private right of action. The search for legislative intent begins with an examination of the language of the statute and then proceeds to a review of the legislative history and the application of traditional aids to statutory interpretation. *See Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, 453 U.S. 1, 13, 101 S.Ct. 2615, 2622, 69 L.Ed.2d 435 (1981).

An examination of the language of the Acts indicates no intent to provide for a private cause of action. Rather, the text of the Acts provides that task forces to formulate management programs and to coordinate management activities among federal, state and local agencies are to be established. Trinity Basin Act, 98 Stat. at 2721, 2722-23 and Klamath Basin Act, 16 U.S.C. § 460ss-1 to -3. The Klamath Basin Act explicitly mandates membership of the Task Force to include representatives of the commercial salmon fishing industry, the in-river sport fishing community, the Department of the Interior, and the Hoopa Valley and Yurok Tribes, indicating that Congress intended the members of these various groups to communicate and resolve disputes through direction of the Task Force. 16 U.S.C. § 460ss-3(c)(1)(A).

Nor does the legislative history indicate any congressional intent to create a private cause of action. Plaintiffs point to legislative history discussing the seriousness of the degradation of the Klamath and Trinity Rivers and the frustration with past federal inaction felt by many

who testified at the hearings on the proposed Acts. However, these facts do not suffice to show legislative intent to create a private remedy. Thus, plaintiffs successfully allege neither an implied private right of action nor a basis for judicial review pursuant to the APA.

Lastly, plaintiffs suggested in their written briefs that the Court should stay consideration of defendants' motion to dismiss pending intervention of either the Yurok or Hoopa Valley Tribes. Plaintiffs in fact assert that the parties have stipulated to such an intervention. However, defendants state that no such stipulation has been agreed to, and indeed, no such stipulation has been filed with the Court. Therefore, the Court declines to stay consideration of defendants' motion for this reason. Plaintiffs' sixth cause of action is therefore dismissed.[16]

CONCLUSION:

For the foregoing reasons, defendants' motion to file a supplemental opposition is granted, and plaintiffs' motion for a partial summary judgment is denied. Plaintiffs' motion to strike is denied, and defendants' motion to dismiss plaintiffs' remaining claims is granted. Further,

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[16] Plaintiffs also allege in their complaint that their sixth cause of action should not be dismissed because it is based on Secretary Babbitt's "trust responsibility." There are no specific pleadings whatsoever regarding this violation, and plaintiffs only address this claim in their motion to dismiss by citing to two cases, which do not suffice to clarify how Secretary Babbitt has allegedly violated a "trust responsibility."

as there are no remaining causes of action in the complaint, the action is dismissed in its entirety.

IT IS SO ORDERED.

PARRAVANO v. BABBITT
837 F.Supp. 1034 (N.D. Cal. 1993)

Pietro PARRAVANO, et al., Plaintiffs,

v.

Bruce BABBITT, as Secretary of the United States Dep't of the Interior, et al., Defendants.

No. C93-2003 TEH.

United States District Court,
N.D. California.

Nov. 3, 1993.

ORDER

THELTON E. HENDERSON, Chief Judge.

This matter came before the Court on Tuesday, August 10, 1993 on the parties' Cross-Motions for Partial Summary Judgment and defendants' Motion to Strike Plaintiffs' Affidavits and Limit Review to the Administrative Record. Having carefully considered the parties' written and oral arguments, and the record herein, the Court grants defendants' motion to strike, and grants in part, and denies in part, the cross-motions for summary judgment as set forth below.[1]

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[1] In order to accommodate the parties' desire for a prompt ruling, the Court issued a summary ruling on August 12, 1993, and stated that it would issue an opinion setting forth a fuller account of its reasoning at a later date. We now issue the fuller opinion referred to in our August 12, 1993 order.

I.

OVERVIEW

The focal point of this action is the popular Klamath River fall chinook. These salmon spawn in the Klamath River and its upper tributaries, migrate downstream to the ocean, and then return to their fresh water origins at age three or four to spawn and then die. An unfortunate combination of overfishing, prolonged drought, and habitat degradation, have led to significantly depressed levels of Klamath chinook stock, to the detriment of commercial fishing interests, sport fishermen, and the Native American tribes who rely on these fish for subsistence and ceremonial needs. *See, United States v. Eberhardt*, 789 F.2d 1354, 1363 (9th Cir.1986) (conc. opin.) (overfishing has depleted the stocks of Klamath River fish). The conflicts inherent in having a chinook population too small to satisfy the needs of all who have a stake in the Klamath salmon are what underlie this case.

Plaintiffs are commercial fishermen and commercial fishing associations[2] who contend that the Secretary of Commerce ("The Secretary") improperly reduced, by way of an invalid emergency regulation, the Klamath chinook ocean harvest rate for the fall fishing season, which opened May 1, 1993. They contend that the Secretary's actions violate the Magnuson Fishery Conservation and

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[2] In addition to seven individual plaintiffs, there are five organizational plaintiffs: Pacific Coast Federation of Fishermen's Associations, Humboldt Fishermen's Marketing Association, Caito Fisheries, Inc., Golden Gate Fishermen's Association, and the Salmon Trollers Marketing Association.

Management Act, 16 U.S.C. §§ 1801 et seq., the Administrative Procedure Act, 5 U.S.C. § 551 et seq., the "Sunshine Act," 5 U.S.C. §§ 552b, and the Pacific Fishery Management Plan. They seek a partial summary judgment (a) overturning that portion of the emergency regulation addressing the Klamath chinook, and (b) ordering enforcement of a higher ocean harvest rate recommended by the Pacific Fishery Management Council.

The Secretary cross-moves for a partial summary judgment affirming the validity of his emergency action.[3] The Secretary also moves to strike several declarations that plaintiffs filed in support of their motion for partial summary judgment. We first address the Motion to Strike, since it will inform the scope of our review on the cross-motions for partial summary judgment.

II.

DEFENDANTS' MOTION TO STRIKE

In support of their Motion for Partial Summary Judgment, plaintiffs have filed several affidavits from ocean commercial fishermen, the California Department of Fish and Game, the Oregon Department of Fish and Wildlife, and a member of the staff of the Pacific Fishery Management Council. The Secretary argues that because his

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[3] By agreement between the parties, the cross-motions for partial summary judgment are limited to issues that do not require litigation of the rights of the Hoopa Valley and Yurok tribes to fish for the Klamath river chinook.

actions may only be reviewed in light of the administrative record, consideration of the these extra-record affidavits is improper.

As plaintiffs concede, the general rule is that judicial review of the Secretary's actions under the Magnuson Act is confined to the administrative record. *Washington Crab Producers, Inc. v. Mosbacher*, 924 F.2d 1438, 1441 (9th Cir.1990); *Asarco, Inc. v. U.S. E.P.A.*, 616 F.2d 1153, 1160 (9th Cir.1980). There are, however, exceptions to this general rule. Specifically, supplementation of the record is appropriate where (1) there is "such a failure to explain administrative action as to frustrate effective judicial review," (2) the agency has relied on documents not included in the record, (3) extra-record evidence is necessary to clarify or explain technical terms, and (4) there is a showing of agency bad faith. *Public Power Council v. Johnson*, 674 F.2d 791, 793-95 (9th Cir.1982). It is the plaintiffs' burden to demonstrate that one or more of these exceptions apply. *See, Animal Defense Council v. Hodel*, 840 F.2d 1432, 1436-38 (9th Cir.1988), *modified*, 867 F.2d 1244 (9th Cir.1989).

Plaintiffs' primary argument is that supplementation is needed because there is "such a failure to explain administrative action as to frustrate effective judicial review." This exception is limited to cases where the agency action is so poorly explained that effective review is precluded. Courts are "reluctant to invoke" this exception; furthermore, "[w]hen there is a need to supplement the record to explain agency action, the preferred procedure is to remand to the agency for its amplification." *Public Power Council*, 674 F.2d at 794; *State of Maine v.*

Kreps, 563 F.2d 1052, 1054 (1st Cir.1977) (action remanded for Secretary to explain basis for her decision).

Even assuming that the Secretary's decision required amplification, the affidavits at issue would not address this deficiency. They do not illuminate the reasons for the **Secretary's** actions, but rather represent the views of persons opposed to the Secretary's action. Accordingly, they are not a proper basis for supplementing the record under the first Public Power Council exception.

Plaintiffs also insinuate that the Secretary has acted in "bad faith" by intentionally omitting two "comment letters." The Secretary states that the letters were forwarded to the regional office late, resulting in their unintentional omission. They have now been added to the record. We find nothing to support the suggestion of wrongdoing or bad faith in the omission of the two letters.

Plaintiffs also suggest that we should treat this case differently because it involves a challenge to an emergency regulation. However, they provide no support for this proposition, and we find no indication in the caselaw that the emergency nature of the regulation affects the traditional rules governing judicial review.[4]

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[4] Plaintiffs also argue that the Motion to Strike is untimely because plaintiffs' declarations were filed along with an earlier Motion for an Order Shortening Time to hear plaintiffs' motion for partial summary judgment. Therefore, plaintiffs argue, defendants waived their right to bring this motion by not objecting to the affidavits during the "scheduling conference/hearing on Motion to Shorten Time." We disagree. First, defendants' counsel did object at the scheduling conference (her

Plaintiffs have failed to demonstrate that their proffered affidavits fall within any of the exceptions delineated by the court in Public Power Council, *supra*. Accordingly, defendants' Motion to Strike shall be granted.

III.

CROSS-MOTIONS FOR PARTIAL SUMMARY JUDGMENT

Background

The Klamath chinook fall under the jurisdiction of three separate government entities. The United States Department of the Interior has jurisdiction over the setting of salmon harvest levels for the Yurok and Hoopa Valley tribes who fish in the Klamath Trinity rivers which flow through their respective reservations. *See Pacific Coast Fed. v. Secretary of Commerce*, 494 F.Supp. 626, 631-633 (N.D.Cal.1980). The United States Department of Commerce has jurisdiction, under the Magnuson Act, to set harvest levels in the ocean between three and two hundred nautical miles offshore, referred to as the "exclusive economic zone" or "EEZ." 16 U.S.C. § 1801 et seq. Finally, the coastal states have jurisdiction over the area between the coast and three nautical miles offshore.[5]

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first opportunity to do so), and indicated she would be filing a motion to strike. More importantly, filing declarations in support of a request to shorten time clearly does not preclude a challenge to their consideration in connection with a completely separate motion for summary judgment.

[5] The state of California also has jurisdiction over recreational, in-river "sport harvest levels." *See* Administrative Record ("AR") at 84.

Plaintiffs' challenge to the Secretary's actions rests primarily on the Magnuson Act. Enacted in 1976, the Magnuson Act was intended to respond to overfishing and inadequate conservation measures which were threatening future commercial and recreational fishing, as well as the very survival of species. 16 U.S.C. § 1801(a); *Lovgren v. Byrne*, 787 F.2d 857, 861 (3rd. Cir.1986) (Magnuson Act "was enacted at a time when overfishing of coastal waters was commonplace, threatening the existence of a number of species of fish"); *Pacific Coast Fed.*, 494 F.Supp. at 635, n. 7 ("over-fishing of species was a primary impetus to passage of the Act").

The Act provides for the establishment of regional Councils which are charged with developing, after public comment, a recommended fishery management plan ("FMP") for regulating fishing in the EEZ. 16 U.S.C. § 1852. The Councils also recommend seasonal adjustments and amendments to the FMP. *Id.* The Council's recommendations are submitted to the Secretary of Commerce who reviews them for consistency with seven "National Standards" set forth in the Act and "other applicable law." Based on this review, the Secretary may either approve or disapprove the Council's recommendations. 16 U.S.C. § 1854; *Eberhardt*, 789 F.2d 1354 at 1363 (Councils "recommend" ocean fishing regulations to the Department of Commerce). The Act also authorizes the Secretary to bypass the above process and promulgate 90-day emergency regulations (which may be extended an additional 90 days), if "the Secretary finds that an emergency exists involving any fishery." 16 U.S.C. § 1855(c)(1).

The EEZ off the coast of Washington, Oregon, and California falls under the purview of the Pacific Fishery

Management Council ("the Council"). In 1984, the Council recommended, and the Secretary adopted, a multi-year management plan for ocean salmon fishery, referred to as "the Final Framework Plan." *See* 50 C.F.R. § 661 (1992). Amendment Nine to the Framework Plan (adopted in 1988) provides for a spawning escapement[6] "rate" for Klamath river chinook of 35 percent of the potential adults from each brood, **but no fewer than 35,000 naturally spawning adults in any one year.** *See* 50 C.F.R. 661, Appendix at IV.A (1992) (emph. added); AR 4 at 12. This latter, 35,000 spawning escapement "floor," represents the *minimum* escapement believed necessary to avoid long-term decline of the Klamath Chinook, and can only be *modified* by formal amendment to the Framework Plan or by emergency regulation. *Id.* Appendix at IV.A., n. 3; 16 U.S.C. § 1854(c).

The Framework Plan recognizes that "Indians[7] residing on the Klamath River have a right to fish for salmon for subsistence and ceremonial purposes." AR 3 at 44; AR 121; *see also, Eberhardt*, 789 F.2d at 1363 (conc. opin.) ("The right to take fish from the Klamath River was reserved to

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[6] Spawning escapement refers to the amount of fish which must be allowed to escape harvest in both the ocean and the river so that they may return to their places of origin to spawn.

[7] The Court's inclination is to use the term "Native American" instead of "Indian." However, the parties and the Administrative Record consistently refer to the members of the Yurok and Hoopa Valley Tribes as "Indians." In the interests of consistency, the Court will utilize the term "Indians" in the remainder of this Order.

the Indians when the Hoopa Valley Reservation was created"). Thus, the Plan requires that the Council, in assessing the optimum yield to be achieved from the Fishery, account for the "requirements of the Indian fishery for salmon on the Klamath River." AR 3 at 9, § 3.3; *see also,* AR 3 at 11, Table 3-2. Finally, we note that the Magnuson Act requires that any management measure be consistent "with . . . and any other applicable law," 16 U.S.C. § 1854(a)(1)(B), which we construe as including United States obligations to Indian reservations with respect to fishing rights.

After holding public hearings, and reviewing analysis by the "Salmon Technical Team," the Council submitted a recommendation to the Secretary of Commerce on April 14, 1993, which, *inter alia,* recommended for the upcoming season a 22 percent ocean harvest rate for Klamath chinook (a substantial increase over the 1992 rate), and a spawning escapement floor of 35,000.

The instant dispute arose when the Secretary rejected the Council's recommendations regarding the Klamath chinook on the ground that they would lead to overfishing and further deterioration of chinook stock. The Secretary subsequently issued an emergency regulation that increased the 35,000 spawning escapement floor to 38,000, and decreased the ocean harvest rate to 14.5 percent.[8] Plaintiffs strenuously oppose the Secretary's actions on a number of procedural and substantive grounds.

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[8] The emergency regulation also incorporated the Council's other recommendations for the 1993 season that did not concern the Klamath River chinook. AR 12 at 26923; AR 13 at 31664.

Standard of Review

Actions taken by the Secretary of Commerce under the Magnuson Act are subject to limited judicial review. 16 U.S.C. § 1855(b). Specifically, Congress provided that courts may only invalidate a challenged regulation if the regulation is (1) arbitrary and capricious or an abuse of discretion, (2) unconstitutional, (3) in excess of statutory jurisdiction, or (4) was promulgated without observance of procedure required by law. *Id.*; 5 U.S.C. § 706(2).

The Ninth Circuit has emphasized the limited nature of review, stating that "[w]e must uphold the Secretary's regulations unless they are arbitrary and capricious." *Northwest Environmental Defense Center v. Brennan*, 958 F.2d 930, 934 (9th Cir.1992); *See also, State of Maine*, 563 F.2d at 1055 (courts may only determine whether Secretary's discretionary action under the Magnuson Act was "exercised rationally and consistently with the standards set by Congress and may not substitute its own judgment . . . for that of the Secretary"). This limited review applies to review of emergency regulations as well. *Pacific Coast Fed.*, 494 F.Supp. at 633 ("The only question is whether the Secretary has made a reasonable finding that an emergency involving the salmon fishery resource exists").

Discussion

Plaintiffs seek to overturn the Secretary's actions on the ground that issuance of the emergency regulation was (a) arbitrary and capricious, and (b) done without observance of procedure required by law. 16 U.S.C. § 1855(b); 5

U.S.C. § 706(2)(A), (D). With respect to the former, plaintiffs contend that issuance of the emergency regulation was arbitrary and capricious because (1) the Secretary was obliged to approve and implement the Council's recommendations because they were consistent with the National Standards in the Magnuson Act, (2) the regulation violates three of the National Standards under the Magnuson Act, and (3) there was no reasonable basis for finding the existence of an emergency.

With respect to the latter, procedural challenges, plaintiffs contend that the Secretary's issuance of the emergency regulation was "not done in observance of procedure required by law" because (1) the Secretary failed to comply with procedures in the Administrative Procedure Act, (2) the Secretary failed to comply with procedures for changing the escapement floor set forth in the Fishery Management Plan, and, (3) the Secretary's meetings with the Secretary of the Interior violated the "Sunshine Act."

Each of these claims is discussed in turn.

ARBITRARY AND CAPRICIOUS ARGUMENTS

(1) Whether the Secretary was Obliged to Approve and Implement the Council's Recommendations because they were consistent with the National Standards in the Magnuson Act.

This claim raises the issue whether the Secretary acted arbitrarily in rejecting the Council's recommendations. In order to resolve this issue, some additional background regarding the Council's recommendation process

and the Secretary's reasons for rejecting the Klamath chinook recommendations is required.

The 1993 ocean management process began in March of 1993, with an initial round of meetings and preparation of reports, including the Salmon Technical Team's analysis of the 1992 season. This report found, among other things, that the spawning escapement of Klamath chinook adults had fallen *below one-third* of the 35,000 minimum floor believed necessary to avoid long-term declines, for the last three years (1990-1992). The 11,100 escapement for 1992 was the lowest on record. AR 25; AR 12.[9]

During the process for accepting public input, The Secretary of the Department of the Interior submitted a letter in his capacity as trustee of the Hoopa Valley and Yurok tribes' federally reserved fishing rights. The letter noted that, while the precise share that the Indians were entitled to had not yet been legally quantified, it was his position that, as a reasonable and prudent trustee, he "must ensure" that at least 50 percent of the total allowable annual harvest be set aside for the "in-river" Indian fishery. AR 121. He further noted that because stock abundance had been extremely low in recent years, the Bureau of Indian Affairs had frequently curtailed Indian fishing to accommodate ocean fisheries, "causing the tribes to bear a large share of the conservation burden." *Id.*[10]

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[9] The escapement was 15,500 in 1990, 11,500 in 1991, and 11,100 in 1992. AR 7 at B-4 and II-4.

[10] In 1986, Judge Beezer on the Ninth Circuit made a pointed comment on the inequities of the situation. *Eberhardt*, 789 F.2d at 1363 (conc. opin.) ("[S]ince the Department of

The Council ultimately developed three options which were subsequently narrowed to two, both of which provided a spawning escapement floor of 35,000. One option provided for a 15 percent ocean harvest rate, which assumed a 50 percent Indian in-river harvest rate; the other provided for a 22 percent ocean harvest rate, which assumed a 32.5 percent Indian in-river harvest rate.

During a further public comment period, a representative of the Interior Department reiterated that it was the Interior Department's clear intent to provide affected tribes with 50 percent of the harvestable fish. AR 251 at S-6. The Hoopa Valley and Yurok Tribe representatives also stated their opposition to any option that did not allow for a 50 percent in-river Indian harvest. AR 251 at S-12 to S-14. In the end, the Council recommended the second option which provided for a 22 percent ocean harvest, a 32.5 percent Indian in-river harvest, and a 35,000 escapement floor.

Commerce fails to provide for adequate escapement from the coastal waters, the Indians on the Hoopa Valley Reservation must bear most of the burden of conservation measures. While the Department of Interior has imposed a moratorium on commercial fishing by Indians, offshore, domestic and foreign commercial fisheries continue to harvest the same fish that spawn in the Klamath River basin ¶ . . . The ocean fisheries have not been required to bear their full share of the conservation burden ¶ . . . Until both the Department of the Interior and the Department of Commerce coordinate fishery management, the Indians will be denied their fair share . . . of the available resource").

As noted above, the Secretary of Commerce can not enforce a 32.5 percent in-river harvest, as the rivers running through the reservations are under the jurisdiction of the Department of the Interior. Nor do plaintiffs dispute that if the Department of Interior followed through on its stated intent to allow a 50 percent in-river Indian harvest, it would be virtually impossible to meet the 35,000 escapement floor; rather, the escapement would be at most 21,000, or only 61 percent of the 35,000 minimum. AR 12 at 26923.

Given the above, the Secretary of Commerce conferred with the Secretary of the Interior upon receiving the Council's recommendations. The result was an agreement whereby the Department of Interior agreed to limit the tribal fishery to a 44.6 percent share (or 18,500 chinook) while the Department of Commerce agreed to increase the escapement floor to 38,000 natural spawners in an effort to improve future stock and compensate for past failures to meet the 35,000 floor. AR 13 at 31665; AR 257. To accommodate these changes, the Secretary of Commerce also reduced the ocean harvest rate to 14.5 percent, well below the Council recommended 22 percent.

The Secretary's disapproval of the Council's recommendations were clearly based on his conclusion that it would be impossible to achieve the 35,000 escapement floor in the event of a 50 percent Indian harvest, particularly given the unsatisfactory escapement levels achieved over the last three years. AR 12 at 26922-23; AR 13 at 31664. The emergency regulation, he explained, would help to achieve the 35,000 floor, and thus serve to rebuild the Klamath chinook stock, and prevent further overfishing. "[T]he Department of Commerce believes

that it is in the best long-term interest of the Klamath River fall chinook resource, the fishing industry, and the tribal fisheries, to achieve as large a spawning escapement as reasonably possible in 1993." AR 12 at 26923.[11]

The Secretary acknowledged that the emergency regulation would reduce the ocean commercial and recreational harvest in the ocean south of Cape Falcon, Oregon by about 89,000 fish.[12] AR 13 at 31665. The Secretary stated, however, that he had "balanced the conservation need for additional spawners against the economic impacts on the ocean fishery in this year, and [had] determined that a spawning escapement of 38,000 retained spawners is a reasonable accommodation of the competing needs." AR 12 at 26923. He justified the temporary increase as scientifically supportable because the

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[11] *See also*, Statement of Regional Director of National Oceanic and Atmospheric Administration urging disapproval of the Council's Klamath chinook recommendations:

> This year, as in the past three years, the Council has developed salmon seasons designed to yield Klamath River fall chinook spawning escapement equal to, or below, the escapement floor. In view of the fact that since 1989 natural spawning escapements to the Klamath River have ranged from 32 to 60 percent of the predicted escapements, the Departments of the Interior and Commerce have agreed that it is in the long-term interest of the Klamath fall chinook resource to set an escapement goal for 1993 above the floor, with the hope of at least attaining the floor.

AR 28 at 2.

[12] This relatively high figure reflects the fact that in order to allow 3,000 additional Klamath chinook spawners to escape, other types of fish who swim in their vicinity must also be allowed to escape capture as well.

Council's salmon technical team had recommended a minimum spawning escapement floor of 43,000 and the end of the drought offered the best opportunity to begin to rebuild the stock to levels that would support healthy and sustained harvests by both tribal and non-tribal fisheries. AR 13 at 31665.

As a legal matter, the Secretary argues that his rejection of the Council's Klamath chinook recommendations must be upheld because he had a reasonable basis for concluding that the recommendations were inconsistent with National Standard One of the Magnuson Act. We agree.

National Standard One provides that:

> Conservation and management measures **shall prevent overfishing** while achieving, on a continuing basis, the optimum yield from each fishery for the United States fishing industry.

16 U.S.C. § 1851(a)(*l*) (emph. added).[13] The depressed state of the Klamath chinook salmon stock and the need to rebuild it has been recognized for some time. AR 4, AR 141, AR 144. The December 1988 Amendment Nine, which set a *minimum* escapement floor of 35,000 was adopted as a necessary measure to achieve this goal. *See* AR-4. Given that the Council's past management measures have proved wholly unsuccessful in achieving the needed escapement, and the promise of a 50 percent Indian in-river harvest, it was eminently reasonable for

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[13] The Secretary has defined "overfishing" as "a level or rate of fishing mortality that jeopardizes the long-term capacity of a stock or stock complex to produce [maximum sustainable yield] on a continuing basis." 50 C.F.R. § 602.11(c)(1) (1989).

the Secretary to conclude that a 22 percent ocean harvest rate would almost certainly result in yet another failed effort to achieve the minimum 35,000 escapement floor.

The result would be four years of overfishing of the Klamath stock (representing an entire life cycle), which would substantially impact the restoration and maintenance of a viable Klamath chinook population. AR 141, 144, 163, 210. As such, the Secretary could rationally conclude that the Council's Klamath chinook recommendations were inconsistent with his obligation to prevent "overfishing" under National Standard One. *See, Brennan,* 958 F.2d at 934 (Secretary must disapprove fishery management plan that does not comply with the National Standards).

Plaintiffs emphasize that the Councils are not meaningless advisory boards, and that the entire Magnuson Act scheme is premised on the Councils having a "meaningful role" in the process. This is certainly true; however, it is equally true that the Secretary's role is not to simply act as a rubberstamp for Council recommendations. Rather, the statute clearly charges the Secretary with reviewing the Council's recommendations, and places ultimate responsibility for compliance with Magnuson Act standards in that office. 16 U.S.C. § 1854(a)(1), (b)(1), (2).

Given all of the circumstances presented here, we can not find that the Secretary acted arbitrarily and capriciously in rejecting the Council's recommendations. Accordingly, his actions can not be judicially overturned on this ground. *Cf. Washington Crab,* 924 F.2d at 1449 ("As the Secretary has explained, his concern is with adequate

escapement to perpetuate the various salmon species to enable the industry and sport to continue, and in particular, to see that the Indians get their allocated share in accordance with the treaties. Given this stated objective, the Secretary was correct to respond to this complaint as he did").

(2) Whether the Secretary's Emergency Regulation Violates Certain of the National Standards under the Magnuson Act.

In addition to arguing that the Secretary improperly rejected the Council's Klamath chinook recommendations, plaintiffs contend that the Secretary's substitute emergency regulation is arbitrary and capricious because it is inconsistent with National Standards One, Two, and Four of the Magnuson Act.

A. *National Standard One*

National Standard One, quoted above, mandates conservation and management measures that prevent overfishing while achieving an "optimum yield" from the fishery. 16 U.S.C. § 1851(a)(1). As plaintiffs emphasize, and the Secretary acknowledges, his regulation will result in a loss of 89,000 catch for ocean fisheries, which will have significant economic consequences. On the other hand, the regulation will also preserve 3,000 more Klamath chinook for future spawning and increase the Indian in-river share by 1,100. *See* AR 12 at 26923; AR 257. Plaintiffs argue, however, that this lopsided cost-benefit violates the Secretary's duty to achieve an "optimum yield," as required by National Standard One.

Clearly, the 89,000 fish "cost" does not equal, in mathematical terms, the 4,100 fish "benefit"; however, such a discrepancy does not necessarily translate into a violation of National Standard One. The Act defines "optimum yield" in broad terms as the amount of the fish that will:

> provide the greatest overall benefit to the Nation, with particular reference to food production and recreational opportunities; and . . . which is prescribed as such on the basis of the maximum sustainable yield from such fishery, as modified by any relevant economic, social, or ecological factors.

16 U.S.C. § 1802(21). No formal "cost-benefit analysis" is required. *Alaska Factory Trawler Ass'n v. Baldridge*, 831 F.2d 1456, 1460 (9th Cir.1987). Nor is the Secretary required to demonstrate that he has chosen "the least restrictive alternative available for managing the . . . resource." *Id.* We are also mindful that the "optimum yield" requirement must be viewed in light of other language in National Standard One, which is aimed at avoiding overfishing.

Given the Administrative Record, the Secretary could rationally conclude that reducing the overall harvest and preserving spawners for future generations, would provide the "greatest overall benefit to the Nation" by aiding the Nation's long term interest in restoring depressed Klamath salmon stocks to healthy levels. The "numerical" cost-benefit disparity, while relevant, is clearly not dispositive under either the Act or Ninth Circuit authority.

It is also clear that the Secretary "balanced the conservation need for additional spawners against the economic impacts of the ocean fishery in this year." AR 12 at 26923. Where the Secretary has balanced the relevant economic and ecological factors, and related them to his conclusions, the Courts are less likely to disturb challenged regulatory action. *See Washington Crab*, 924 F.2d at 1149 ("The Secretary's interpretation of his duties and obligations are reasonable in that he 'has considered the relevant factors [under the Magnuson Act] and articulated a rational connection between the facts found and the choice made' ").

Accordingly, we decline to find that the Secretary's action was arbitrary and capricious on the ground that the emergency regulation conflicts with National Standard One.

National Standard Four

Plaintiffs argue that the 89,000-4,100 disparity discussed above also violates National Standard Four because it establishes an unfair and inequitable distribution among fishermen. National Standard Four provides in part that:

> If it becomes necessary to allocate or assign fishing privileges among various United States fishermen, such allocation shall be (A) fair and equitable to all such fishermen; (B) reasonably calculated to promote conservation, and (c) carried out in such manner that no particular individual, corporation or other entity acquires an excessive share of such privileges.

16 U.S.C. § 1851(a)(4). The Secretary's regulation was premised on an Indian harvest of 44.6 percent and a non-Indian harvest of 55.4 percent. Given that the Secretary was required to consider the requirements of the Indian in-river fishery, and the Interior Secretary's position that the Hoopa Valley and Yurok Indians were entitled to a 50 percent share, the Secretary could reasonably conclude that this distribution was "fair and equitable" for purposes of National Standard Four.

National Standard Two

Plaintiffs also contend that the Secretary's decision to increase the escapement floor from 35,000 to 38,000, and reduce the ocean harvest level to 14.5 percent, violated National Standard Two, which provides that "[c]onservation and management measures shall be based upon the best scientific information available." 16 U.S.C. § 1851(a)(2). By requiring that decisions be based on the best scientific information *available*, the Act acknowledges that such information may not be exact or totally complete. *See e.g., Washington Crab*, 924 F.2d at 1448-49.

Plaintiffs contend that the Secretary's deviations from the Council's recommendations find no scientific support in the Administrative Record, and that it is the Council's recommendations that are based on "the best scientific information available." Accordingly, they argue, the Secretary lacks any rational basis for finding that his emergency regulation comports with National Standard Two.

As held above, the Secretary was entitled to reject the Council's Klamath chinook recommendations because, by

failing to compensate for a sufficient in-river Indian harvest, they were likely to result in overfishing for a fourth consecutive year. As such, the Secretary was entitled to address this problem by accommodating a higher Indian in-river share than the Council recommended share of 32.5 percent, while at the same time protecting the minimum 35,000 spawning floor.

However, the particular manner by which the Secretary chooses to address the problem must have some support in the Administrative Record, such that the Secretary may reasonably conclude that his chosen method is consistent with Magnuson Act National Standards, including National Standard Two. We conclude that while there may well be adequate support for the specific approach taken by the Secretary, it is not apparent in the current record which provides only conclusory assertions that the higher 38,000 escapement floor, and correspondingly reduced 14.5 percent ocean harvest rate, will achieve the Secretary's legitimate objectives.

For example, the Secretary, through his representatives, has stated that the higher 38,000 escapement floor represented his "best estimate" of the way to achieve his objectives while minimizing social and economic impacts. *See e.g.*, AR 252 at 7, 9. The Secretary, however, has not pointed to anything in the record which specifically explains why this is his "best estimate" or how it is based on the "best scientific information available."

While the Secretary has noted that the Salmon Technical Team recommended a 43,000 escapement floor, there is no non-conclusory analysis supporting a 38,000 floor in the record. Nor has the Secretary pointed to any specific

explanation for his conclusion that a 38,000 escapement floor will help achieve a 35,000 floor. Again, this is not to say that such analysis or justification could not be shown, but rather that such justification is not apparent in the current record.[14]

The Secretary acknowledges that the 38,000 floor was part of a compromise negotiated with the Secretary of the Interior concerning Indian In-River harvest rates. There is nothing improper with compromise *per se*. Indeed, much of the Magnuson Act process is designed to facilitate compromise between various competing interests. *See also, Eberhardt*, 789 F.2d at 1363 (conc. opin.) (cooperation among government agencies essential to preserve Indian fishing rights). However, the purpose of the Magnuson Act is to ensure that such compromise decisions are adequately explained and based on the best scientific evidence available – and not simply a matter of political compromise.

We acknowledge that, under the circumstances presented here, the Secretary was required to act under significant time constraints. New technical studies were

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[14] The Secretary has also noted that his decision to increase the escapement floor was supported by the fact that this year marked the end of a drought. However, there is little in the current record to specifically support this justification. At argument, counsel for the Secretary stated that this was simply a matter of "general knowledge." However, the issue of how the drought's end should impact planning for the instant fishing season was a matter of some dispute. Under these circumstances, the Court is not persuaded that it is sufficient for the Secretary to simply assert that "general knowledge" supports his justification.

neither practicable nor expected. Nonetheless, the escapement floor raises an issue of great significance to many, and we can not relieve the Secretary of his duty to demonstrate, through concrete analysis, that he could rationally conclude that his approach would accomplish his legitimate objectives based on the best scientific information available.

(3) Whether There was a Reasonable Basis for Invoking Emergency Powers

Congress expressly vested the Secretary with authority to impose emergency regulations in appropriate circumstances. Specifically, 16 U.S.C. § 1855(c) provides in part that "[i]f the Secretary finds that an emergency exists involving any fishery, he may promulgate emergency regulations necessary to address the emergency." The Court's only inquiry in this regard is whether the Secretary has made "a reasonable finding that an emergency exists." *Pacific Coast*, 494 F.Supp. at 633. In resolving this question, we may not presume bad faith on the part of the Secretary. *Id.*

Plaintiffs emphasize that emergency action should "not be based on administrative inaction to solve a long recognized problem." 57 F.R. No. 3 at 375 (January 6, 1992). Here, they argue, the Secretary unfairly conjured up a crisis, based on the longstanding, unresolved question of the extent of the Yurok and Hoopa Valley tribes' in-river fishing rights. While this argument may have some appeal on the surface, it loses force once we find that the Secretary had a reasonable basis for rejecting the

Council's recommendations in order to avoid further overfishing of the Klamath chinook.

All parties agree that once the Secretary rejected the Council's recommendations, the fishing season, scheduled to open May 1, 1993, could not go forward unless the Secretary promulgated substitute emergency regulations.[15] AR 12 at 26922-23; AR 20. Thus, the Secretary was required to invoke his emergency authority in order to avoid the severe economic harm that would result should the season fail to occur at all. AR 13 at 31664.

The Federal Register provides that "Congress intended that emergency authority be available to address conservation, biological, economic, and social emergencies." 57 F.R. No. 3 at 375. It further specifies that an emergency justification may be "ecological" or "economic – to prevent significant direct economic loss or to preserve a significant economic opportunity that otherwise might be foregone." *Id.* Once the Secretary was justified in rejecting the Council's recommendations, the economic consequences of not opening the season clearly provided a reasonable basis for the Secretary's finding that there was an "emergency" that warranted invocation of his emergency powers.

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[15] The Secretary did give the Council an opportunity to provide revised recommendations but it declined to recommend an alternative consistent with the Secretary's approach.

PROCEDURAL ARGUMENTS

As discussed above, plaintiffs also contend that the Secretary's action should be invalidated on three procedural grounds. Specifically, plaintiffs contend that the Secretary's action was "without observance of procedure required by law," 5 U.S.C. § 706(2)(D), because (1) the Secretary failed to comply with procedures in the APA, 5 U.S.C. § 553, (2) The Secretary failed to comply with procedures for changing the escapement floor set forth in the Fishery Management Plan, and (3) the Secretary's meetings with the Secretary of the Interior violated the "Sunshine Act," 5 U.S.C. § 552b.

1. *APA Procedures*

Plaintiffs object that the Secretary issued his emergency regulation without complying with standard APA notice and comment rule making procedures. *See* 5 U.S.C. § 553. It is unclear whether section 553 applies in this context, given that annual management measures approved by the Secretary are implemented simply by notice published in the Federal Register. However, even assuming the general applicability of section 553, the APA contains an exception for situations where the agency for "good cause" finds that notice and public procedure would be impracticable. 5 U.S.C. §§ 553(b)(B), 553(d)(3).

Here, we have already held that the Secretary had a reasonable basis for finding that emergency, expedited action was warranted to avoid closure of the fall fishing season. We conclude that such a finding under the Magnuson Act satisfies the "good cause" requirement under

the APA. *See Northern Arapahoe Tribe v. Hodel,* 808 F.2d 741, 751 (10th Cir.1987) (good cause exception designed for instances where "delay would do real harm").

2. *Fishery Management Plan Procedures*

The Framework FMP provides that the escapement floor can only be modified by amendment to the FMP. 50 C.F.R. § 661, Appendix at IV.A., n. 3. Plaintiffs object that there has been no such amendment. However, the Magnuson Act expressly states that an emergency regulation "shall be treated as an amendment to such plan for the period in which such regulation is in effect." 16 U.S.C. § 1855(c)(3). Given our holding that the Secretary properly invoked his emergency authority, the emergency regulation issued functions as a temporary amendment to the FMP. Accordingly, the Secretary's action did not conflict with FMP required procedures.

3. *Sunshine Act*

Finally, plaintiffs argue that the Secretary violated the "Sunshine Act" by privately meeting with the Secretary of the Interior to discuss coordination of Indian in-river and ocean harvest fishing rates. The Sunshine Act, 5 U.S.C. § 552b, provides that agency meetings shall generally be open to the public. However, the term "agency" is defined as an agency that is headed by a "collegial body composed of two or more individual members." 5 U.S.C. § 552b(a)(1). Because the Department of Commerce is headed by a single person, not a collegial body, this provision does not apply.

Plaintiffs also complain that the Secretary's meetings with Interior Secretary Babbitt constituted improper "ex parte contacts" in violation of 5 U.S.C. § 557(d)(1). However, this provision only applies to formal rulemakings or adjudications. 5 U.S.C. § 557(a). *See, Portland Audubon Society v. Endangered Species Committee*, 984 F.2d 1534, 1540 (9th Cir.1992); *cf. Sierra Club v. Costle*, 657 F.2d 298, 406-407 (D.C.Cir.1981). Accordingly, we find no violation of the Sunshine Act.

CONCLUSION

For the reasons set forth above, and good cause appearing, it is HEREBY ORDERED that (1) Defendants' Motion to Strike Affidavits is granted, and (2) Plaintiffs' and Defendants' Motions for Partial Summary Judgment are granted in part, and denied in part, consistent with this Order.

The Court upholds the Secretary's rejection of the Council's Klamath chinook recommendations, and his invocation of emergency powers under the Magnuson Act. The Court also rejects plaintiffs' contentions of procedural irregularities. However, the Court can not validate the Secretary's action increasing the escapement floor to 38,000 based on the current record for the reasons set forth above. Under the circumstances, we conclude that the most appropriate course of action is to remand the matter to the Secretary of Commerce for reconsideration and further proceedings consistent with this decision. *Asarco*, 616 F.2d at 1159; *Kreps*, 563 F.2d at 1054.

Upon remand, the Secretary may either supply additional explanation for its decision to increase the spawning escapement floor to 38,000 or use his emergency authority to approve any other spawning escapement floor and ocean harvest rate, for the duration of the emergency regulation, which he could reasonably find is supported by the Administrative Record and is consistent with the Magnuson Act and other applicable law. This ruling is not intended to affect any aspect of the Secretary's emergency regulation except with respect to those provisions directed to the Klamath River fall Chinook as discussed in this order.

IT IS SO ORDERED.

Administration Procedures Act

5 U.S.C. 706

§ 706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall –

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be –

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure, required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

The Klamath River Basin Fishery Resources Restoration Act (relevant sections)

16 U.S.C. 460ss-1(b) Klamath River Basin Conservation Area Restoration Program.

(1) Establishment

The Secretary shall, in consultation with the task force established under section 460ss-3 of this title, formulate, establish, and implement a 20-year program to restore the anadromous fish populations of the Area to optimum levels and to maintain such levels. The program shall be based on the Klamath River Basin Fisheries Resource Plan referred to in section 460ss(6) of this title and shall be known as the Klamath River Basin Conservation Area Restoration Program.

(2) Program activities

In carrying out the objectives of the program, the Secretary, in cooperation with the task force established under section 460ss-3 of this title, shall –

(A) monitor and coordinate research evaluating the Area anadromous fish populations and administer and evaluate the success of activities described in subparagraph (B); and

(B) take such actions as are necessary to –

(i) improve and restore Area habitats, and to promote access to blocked Area habitats, to support increased run sizes;

(ii) rehabilitate problem watersheds in the Area to reduce negative impacts on fish and fish habitats;

(iii) improve existing Area hatcheries and rearing ponds to assist in rebuilding the natural populations;

(iv) implement an intensive, short-term stocking program to rebuild run sizes while maintaining the genetic integrity and diversity of Area subbasin stocks; and

(v) improve upstream and downstream migration by removal of obstacles to fish passage and the provision of facilities for avoiding obstacles.

(3) Restoration work

To the extent practicable, any restoration work performed under paragraph (2)(B) shall be performed by unemployed –

(A) commercial fishermen;

(B) Indians; and

(C) other persons whose livelihood depends upon Area fishery resources.

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16 U.S.C. 460ss-2 Klamath Fishery Management Council

(a) Establishment

There is established a Klamath Fishery Management Council (hereafter[3] in this subchapter referred to as the "Council").

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[3] So in original. Probably should be "hereinafter".

(b) Functions

(1) The Council shall –

(A) establish a comprehensive long-term plan and policy, that must be consistent with the goals of the program, for the management of the in-river and ocean harvesting that affects or may affect Klamath and Trinity River basin anadromous fish populations;

(B) make recommendations, that must be consistent with the plan and policy established under subparagraph (A) and with the standards in paragraph (2) –

(i) to the California Fish and Game Commission regarding in-river and offshore recreational harvesting regulations,

(ii) to the Oregon Department of Fish and Wildlife regarding offshore recreational harvesting regulations,

(iii) to the Pacific Fishery Management Council regarding ocean harvesting regulations,

(iv) to the Bureau of Indian Affairs regarding regulations for harvesting in the Area by non-Hoopa Indians, and

(v) to the Hoopa Valley Business Council regarding regulations for harvesting in the Area by members of the Hoopa Indian Tribe; and

(C) conduct public hearings on any regulation referred to in subparagraph (B)(i) through (v).

(2) Any recommendation made by the Council under paragraph (1)(B) regarding harvesting regulations shall –

(A) be based upon the best scientific information available;

(B) minimize costs where practicable, and avoid unnecessary duplication of regulations;

(C) take into account and allow for variations among, and contingencies in, fisheries, fishery resources, and catches; and

(D) be designed to achieve an escapement that preserves and strengthens the viability of the Area's natural anadromous fish populations.

(c) Membership and appointment

The Council is composed of 11 members as follows:

(1) A representative, who shall be appointed by the Governor of California, of each of the following:

(A) The commercial salmon fishing industry,

(B) The in-river sportfishing community,

(C) The offshore recreational fishing industry,

(D) The California Department of Fish and Game.

(2) A representative of the Hoopa Indian Tribe who shall be appointed by Hoopa Valley Business Council.

(3) A representative who shall be appointed by the Secretary, of each of the following:

(A) The non-Hoopa Indians residing in the Area.

(B) The Department of the Interior.

(4) A representative, who shall be appointed by the Secretary of Commerce, of each of the following –

(A) The National Marine Fisheries Service.

(B) The Pacific Fishery Management Council.

(5) A representative, who shall be appointed by the Governor of Oregon, of each of the following:

(A) The commercial salmon fishing industry.

(B) The Oregon Department of Fish and Wildlife.

(d) Consultation requirement

The appointments required under subsection (c) of this section shall be made in consultation with the appropriate users of Area anadromous fish resources.

FISHERY AND CONSERVATION MANAGEMENT ACT (relevant sections)

16 USC § 1801

§ 1801. Findings, purposes and policy

(a) Findings. The Congress finds and declares the following:

(1) The fish off the coasts of the United States, the highly migratory species of the high seas, the species which dwell on or in the Continental Shelf appertaining to the United States, and the anadromous species which spawn in United States rivers or estuaries, constitute valuable and renewable natural resources. These fishery resources contribute to the food supply, economy, and health of the Nation and provide recreational opportunities.

(2) As a consequence of increased fishing pressure and because of the inadequacy of fishery conservation and management practices and controls (A) certain stocks of such fish have been overfished to the point where their survival is threatened, and (B) other such stocks have been so substantially reduced in number that they could become similarly threatened.

(3) Commercial and recreational fishing constitutes a major source of employment and contributes significantly to the economy of the Nation. Many coastal areas are dependent upon fishing and related activities, and their economies have been badly damaged by the overfishing of fishery resources at an ever-increasing rate over the past decade. The activities of massive foreign fishing fleets in waters adjacent to such coastal

areas have contributed to such damage, interfered with domestic fishing efforts, and caused destruction of the fishing gear of United States fishermen.

(4) International fishery agreements have not been effective in preventing or terminating the overfishing of these valuable fishery resources. There is danger that irreversible effects from overfishing will take place before an effective international agreement on fishery management jurisdiction can be negotiated, signed, ratified, and implemented.

(5) Fishery resources are finite but renewable. If placed under sound management before overfishing has caused irreversible effects, the fisheries can be conserved and maintained so as to provide optimum yields on a continuing basis.

(6) A national program for the conservation and management of the fishery resources of the United States is necessary to prevent overfishing, to rebuild overfished stocks, to insure conservation, and to realize the full potential of the Nation's fishery resources.

(7) A national program for the development of fisheries which are underutilized or not utilized by the United States fishing industry, including bottom fish off Alaska, is necessary to assure that our citizens benefit from the employment, food supply, and revenue which could be generated thereby.

(b) Purposes. It is therefore declared to be the purposes of the Congress in this Act –

(1) to take immediate action to conserve and manage the fishery resources found off the

coasts of the United States, and the anadromous species and Continental Shelf fishery resources of the United States, by establishing (A) a fishery conservation zone within which the United States will assume exclusive fishery management authority over all fish, except highly migratory species, and (B) exclusive fishery management authority beyond such zone over such anadromous species and Continental Shelf fishery resources;

(2) to support and encourage the implementation and enforcement of international fishery agreements for the conservation and management of highly migratory species, and to encourage the negotiation and implementation of additional such agreements as necessary;

(3) to promote domestic commercial and recreational fishing under sound conservation and management principles;

(4) to provide for the preparation and implementation, in accordance with national standards, of fishery management plans which will achieve and maintain, on a continuing basis, the optimum yield from each fishery;

(5) to establish Regional Fishery Management Councils to prepare, monitor, and revise such plans under circumstances (A) which will enable the States, the fishing industry, consumer and environmental organizations, and other interested persons to participate in, and advise on, the establishment and administration of such plans, and (B) which take into account the social and economic needs of the States; and

(6) to encourage the development by the United States fishing industry of fisheries which

are currently underutilized or not utilized by United States fishermen, including bottom fish off Alaska, and to that end, to ensure that optimum yield determinations promote such development.

(c) **Policy.** It is further declared to be the policy of the Congress in this Act –

(1) to maintain without change the existing territorial or other ocean jurisdiction of the United States for all purposes other than the conservation and management of fishery resources, as provided for in this Act;

(2) to authorize no impediment to, or interference with, recognized legitimate uses of the high seas, except as necessary for the conservation and management of fishery resources, as provided for in this Act;

(3) to assure that the national fishery conservation and management program utilizes, and is based upon, the best scientific information available; involves, and is responsive to the needs of, interested and affected States and citizens; promotes efficiency; draws upon Federal, State, and academic capabilities in carrying out research, administration, management, and enforcement; and is workable and effective;

(4) to permit foreign fishing consistent with the provisions of this Act; and

(5) to support and encourage continued active United States efforts to obtain an internationally acceptable treaty, at the Third United Nations Conference on the Law of the Sea, which provides for effective conservation and management of fishery resources.

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16 USC § 1851

§ 1851. National standards for fishery conservation and management

(a) In general. Any fishery management plan prepared, and any regulation promulgated to implement any such plan, pursuant to this title [16 USC §§ 1851 et seq.] shall be consistent with the following national standards for fishery conservation and management.

(1) Conservation and management measures shall prevent overfishing while achieving, on a continuing basis, the optimum yield from each fishery.

(2) Conservation and management measures shall be based upon the best scientific information available.

(3) To the extent practicable, an individual stock of fish shall be managed as a unit throughout its range, and interrelated stocks of fish shall be managed as a unit or in close coordination.

(4) Conservation and management measures shall not discriminate between residents of different States. If it becomes necessary to allocate or assign fishing privileges among various United States fishermen, such allocation shall be (A) fair and equitable to all such fishermen; (B) reasonably calculated to promote conservation; and (C) carried out in such manner that no particular individual, corporation, or other entity acquires an excessive share of such privileges.

(5) Conservation and management measures shall, where practicable, promote efficiency in

the utilization of fishery resources; except that no such measure shall have economic allocation as its sole purpose.

(6) Conservation and management measures shall take into account and allow for variations among, and contingencies in, fisheries, fishery resources, and catches.

(7) Conservation and management measures shall, where practicable, minimize costs and avoid unnecessary duplication.

(b) Guidelines. The Secretary shall establish advisory guidelines which shall not have the force and effect of law), based on the national standards, to assist in the development of fishery management plans.

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16 USC § 1852

§ 1852. Regional Fishery Management Councils

(a) Establishment. There shall be established, within 120 days after the date of the enactment of this Act [enacted Apr. 13, 1976], eight Regional Fishery Management Councils, as follows:

. . .

(6) Pacific Council. The Pacific Fishery Management Council shall consist of the State of California, Oregon, Washington, and Idaho and shall have authority over the fisheries in the Pacific Ocean seaward of such States. The Pacific Council shall have 13 voting members,

including 8 appointed by the Secretary in accordance with subsection (b)(2) (at least one of whom shall be appointed from each such State).

. . .

Each Council shall reflect the expertise and interest of the several constituent States in the ocean area over which such Council is granted authority.

(b) Voting members. (1) The voting members of each Council shall be:

(A) The principal State official with marine fishery management responsibility and expertise in each constituent State, who is designated as such by the Governor of the State, so long as the official continues to hold such position, or the designee of such official.

(B) The regional director of the National Marine Fisheries service for the geographic area concerned, or his designee, except that if two such directors are within such geographical area, the secretary shall designate which of such directors shall be the voting member.

(C) The members required to be appointed by the secretary in accordance with subsection (b)(2).

(2)(A) The members of each Council required to be appointed by the Secretary must be individuals who are knowledgeable or experienced with regard to the management, conservation, or recreational or commercial harvest of the fishery resources of the geographical area concerned.

(B) The Secretary shall appoint the members of each Council from a list of individuals

submitted by the Governor of each applicable constituent State. Each such list shall include the names and pertinent biographical data of not less than three individuals for each applicable vacancy. The Secretary shall review each list submitted by a Governor to ascertain if the individuals on the list are qualified for the vacancy on the basis of the required knowledge or experience required by subparagraph (A). If the secretary determines that any individual is not qualified, he shall notify the appropriate Governor of that determination. The Governor shall then submit a revised list or resubmit the original list with an additional explanation of the qualifications of the individual in question.

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16 USC § 1853

§ 1853. Contents of fishery management plans

(a) Required provisions. Any fishery management plan which is prepared by any Council, or by the Secretary, with respect to any fishery, shall –

(1) contain the conservation and management measures, applicable to foreign fishing and fishing by vessels of the United States, which are –

(A) necessary and appropriate for the conservation and management of the fishery;

(B) described in this subsection or subsection (b), or both; and

(C) consistent with the national standards, the other provisions of this Act, and any other applicable law;

(2) contain a description of the fishery, including, but not limited to, the number of vessels involved, the type and quantity of fishing gear used, the species of fish involved and their location, the cost likely to be incurred in management, actual and potential revenues from the fishery, any recreational interests in the fishery, and the nature and extent of foreign fishing and Indian treaty fishing rights, if any;

(3) assess and specify the present and probable future condition of, and the maximum sustainable yield and optimum yield from, the fishery, and include a summary of the information utilized in making such specification;

(4) assess and specify –

(A) the capacity and the extent to which fishing vessels of the United States, on an annual basis, will harvest the optimum yield specified under paragraph (3),

(B) the portion of such optimum yield which, on an annual basis, will not be harvested by fishing vessels of the United States and can be made available for foreign fishing, and

(C) the capacity and extent to which United States fish processors, on an annual basis, will process that portion of such optimum yield that will be harvested by fishing vessels of the United States; and

(5) specify the pertinent data which shall be submitted to the Secretary with respect to the

fishery, including, but not limited to, information regarding the type and quantity of fishing gear used, catch by species in numbers of fish or weight thereof, areas in which fishing was engaged in, time of fishing, number of hauls, and the estimated processing capacity of, and the actual processing capacity utilized by, United States fish processors.

(b) Discretionary provisions. Any fishery management plan which is prepared by any Council, or by the Secretary, with respect to any fishery, may –

(1) require a permit to be obtained from, and fees to be paid to, the Secretary with respect to any fishing vessel of the United States fishing, or wishing to fish, in the fishery conservation zone, or for anadromous species or Continental Shelf fishery resources beyond such zone;

(2) designate zones where, and periods when, fishing shall be limited, or shall not be permitted, or shall be permitted only by specified types of fishing vessels or with specified types and quantities of fishing gear;

(3) establish specified limitations on the catch of fish (based on area, species, size, number, weight, sex, incidental catch, total biomass, or other factors), which are necessary and appropriate for the conservation and management of the fishery;

(4) prohibit, limit, condition, or require the use of specified types and quantities of fishing gear, fishing vessels, or equipment for such vessels, including devices which may be required to facilitate enforcement of the provisions of this Act;

(5) incorporate (consistent with the national standards, the other provisions of this Act, and any other applicable law) the relevant fishery conservation and management measures of the coastal States nearest to the fishery;

(6) establish a system for limiting access to the fishery in order to achieve optimum yield if, in developing such system, the Council and the Secretary take into account –

(A) present participation in the fishery,

(B) historical fishing practices in, and dependence on, the fishery,

(C) the economics of the fishery,

(D) the capability of fishing vessels used in the fishery to engage in other fisheries,

(E) the cultural and social framework relevant to the fishery, and

(F) any other relevant considerations;

(7) assess and specify the effect which the conservation and management measures of the plan will have on the stocks of naturally spawning anadromous fish in the region; and

(8) prescribe such other measures, requirements, or conditions and restrictions as are determined to be necessary and appropriate for the conservation and management of the fishery.

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16 USC § 1854

§ 1854. Action by Secretary

(a) Action by the Secretary after receipt of plan. (1) After the Secretary receives a fishery management plan, or amendment to a plan, which was prepared by a Council (the date of receipt of which is hereafter in this section referred to as the "receipt date"), the Secretary shall –

(A) immediately commence a review of the management plan or amendment to determine whether it is consistent with the national standards, the other provisions of this Act, and any other applicable law;

(B) immediately publish in the Federal Register a notice stating that the plan or amendment is available and that written data, views, or comments of interested persons on the plan or amendment may be submitted to the Secretary during the 75-day period beginning on the receipt date; and

(C) by the 30th day after the receipt date –

(i) make such changes in the proposed regulations submitted for the plan or amendment under section 303(c) [16 USC § 1853(c)] as may be necessary for the implementation of the plan, and

(ii) publish such proposed regulations, including any changes made thereto under clause (i), in the Federal Register together with an explanation of those changes which are substantive.

(2) In undertaking the review required under paragraph (1)(A), the Secretary shall –

(A) take into account the data, views, and comments received from interested persons;

(B) consult with the Secretary of State with respect to foreign fishing; and

(C) consult with the Secretary of the department in which the Coast Guard is operating with respect to enforcement at sea.

(b) Review by Secretary. (1) A plan or amendment shall take effect and be implemented in accordance with section 305(c) [16 USC § 1855(c)] if –

(A) the Secretary does not notify the Council in writing of his disapproval, or partial disapproval, under paragraph (2), of the plan or amendment before the close of the 95th day after the receipt date; or

(B) at any time subsequent to the 75th day after the receipt date and before such 95th day, the Secretary notifies the Council in writing that he does not intend to disapprove, or partially disapprove, the plan or amendment.

(2) If after review under subsection (a) the Secretary determiens that the plan or amendment is not consistent with the criteria set forth in paragraph (1)(A) of that subsection, the Secretary shall notify the Council in writing of his disapproval or partial disapproval of the plan or amendment. Such notice shall specify –

(A) the applicable law with which the plan or amendment is inconsistent;

(B) the nature of such inconsistency; and

(C) recommendations concerning the actions that could be taken by the Council to

conform such plan or amendment to the requirements of applicable law.

(3)(A) If the Secretary disapproves, or partially disapproves, a proposed plan or amendment under paragraph (2), the Council may submit a revised plan or amendment, accompanied by appropriately revised proposed regulations, to the Secretary.

(B) After the Secretary receives a revised plan or amendment under subparagraph (A) or (C)(ii), the Secretary shall immediately –

(i) commence a review of the plan or amendment to determine whether it complies with the criteria set forth in subsection (a)(1)(A);

(ii) publish in the Federal Register a notice stating that the revised plan or amendment is available and that written data, views, or comments of interested persons on the plan or amendment may be submitted to the Secretary during the 30-day period beginning on the date (hereinafter in this paragraph referred to as the "revised receipt date") the plan or amendment was submitted to the Secretary under subparagraph (A) or (C)(ii); and

(iii) review the revised proposed regulations, if any, submitted by the Council and make such changes to them as may be necessary for the implementation of the plan, and thereafter publish such revised proposed regulations (as so changed) in the Federal Register

together with an explanation of each of such changes that is substantive.

(C)(i) Before the close of the 60th day after the revised receipt date, the Secretary, after taking into account any data, views, or comments received under subparagraph (B)(ii), shall complete the review required under subparagraph (B)(i) and determine whether the plan or amendment complies with the criteria set forth in subsection (a)(1)(A). If the Secretary determines that a plan or amendment is not in compliance with such criteria, he shall immediately notify the Council of his disapproval of the plan or amendment.

(ii) After notifying a Council of disapproval under clause (i), the Secretary shall promptly provide to the Council a written statement of the reasons on which the disapproval was based and advise the Council that it may submit a further revised plan or amendment, together with appropriately revised proposed regulations, for review and determination under this paragraph.

(D) A revised plan or amendment shall take effect and be implemented in accordance with section 305(c) [16 USC § 1855(c)] if the Secretary does not notify the Council, in writing, by the close of the 60th day after the revised receipt date of his disapproval of the plan or amendment.

(c) Preparation by Secretary. (1) The Secretary may prepare a fishery management plan, with respect to any

fishery, or any amendment to any such plan, in accordance with the national standards, the other provisions of this Act, and any other applicable law, if –

(A) the appropriate Council fails to develop and submit to the Secretary, after a reasonable period of time, a fishery management plan for such fishery, or any necessary amendment to such a plan, if such fishery requires conservation and management; or

(B) the Secretary disapproves or partially disapproves any such plan or amendment, or disapproves a revised plan or amendment, and the Council involved fails to submit a revised or further revised plan or amendment, as the case may be.

In preparing any such plan or amendment, the Secretary shall consult with the Secretary of State with respect to foreign fishing and with the Secretary of the department in which the Coast Guard is operating with respect to enforcement at sea. The Secretary shall also prepare such proposed regulations as he deems necessary to appropriate to carry out each plan or amendment prepared by him under this paragraph.

(2)(A) Whenever, under paragraph (1), the Secretary prepares a fishery management plan or amendment, the Secretary shall immediately –

(i) submit such plan or amendment, and proposed regulations to implement such plan or amendment, to the appropriate Council for consideration and comment;

(ii) publish in the Federal Register a notice stating that the plan or amendment in available and

that written data, views, or comments of interested persons on the plan or amendment may be submitted to the Secretary during the 75-day period beginning on the date the plan or amendment was submitted under clause (i); and

(iii) by the 30th day after the date of submission under clause (i), submit for publication in the Federal Register the proposed regulations to implement the plan or amendment.

(B) The appropriate council [Council] must submit its comments and recommendations, if any, regarding the plan or amendment to the Secretary before the close of the 75-day period referred to in subparagraph (A)(ii). After the close of such 75-day period, the Secretary, after taking into account any such comments and recommendations, as well as any views, data, or comments submitted under subparagraph (A)(ii), may implement such plan or amendment under section 305(c) [16 USC § 1855(c)].

(3) Notwithstanding paragraph (1), the Secretary may not include in any fishery management plan, or any amendment to any such plan, prepared by him, a provision establishing a limited access system described in section 303(b)(6) [16 USC § 1853(b)(6)], unless such system is first approved by a majority of the voting members, present and voting, of each appropriate Council.

(d) Establishment of fees. The Secretary shall by regulation establish the level of any fees which are authorized to be charged pursuant to section 303(b)(1) [16 USC § 1853(b)(1)]. The Secretary may enter into a cooperative agreement with the States concerned under which the

States administer the permit system and the agreement may provide that all or part of the fees collected under the system shall accrue to the States. The level of fees charged under this subsection shall not exceed the administrative costs incurred in issuing the permits.

(e) Fisheries research. The Secretary shall initiate and maintain a comprehensive program of fishery research to carry out and further the purposes, policy, and provisions of this Act. Such program shall be designed to acquire knowledge and information, including statistics, on fishery conservation and management, including, but not limited to, biological research concerning the interdependence of fisheries or stocks of fish, the impact of pollution of fish, the impact of wetland and estuarine, degredation, and other mattes bearing upon the abundance and availability of fish.

(f) Miscellaneous duties. (1) If any fishery extends beyond the geographical area of authority of any one Council, the Secretary may –

> (A) designate which Council shall prepare the fishery management plan for such fishery and any amendment to such plan; or
>
> (B) may require that the plan and amendment be prepared jointly by the Councils concerned.

No jointly prepared plan or amendment may be submitted to the Secretary unless it is approved by a majority of the voting members, present and voting, of each Council concerned.

(2) The Secretary shall establish the boundaries between the geographical areas of authority of adjacent Councils.

HOOPA-YUROK SETTLEMENT ACT

25 U.S.C. 1300i

An Act to partition certain reservation lands between the Hoopa Valley Tribe and the Yurok Indians, to clarify the use of tribal timber proceeds, and for other purposes.

SEC. 2. RESERVATIONS; PARTITION AND ADDITIONS.

(a) PARTITION OF THE JOINT RESERVATION. – (1) Effective with the publication in the Federal Register of the Hoopa tribal resolution as provided in paragraph (2), the joint reservation shall be partitioned as provided in subsections (b) and (c).

(2)(A) The partition of the joint reservation as provided in this subsection, and the ratification and confirmation as provided by section 8, shall not become effective unless, within 60 days after the date of the enactment of this Act, the Hoopa Valley Tribe shall adopt, and transmit to the Secretary, a tribal resolution:

> (i) waiving any claim such tribe may have against the United States arising out of the provisions of this Act, and
>
> (ii) affirming tribal consent to the contribution of Hoopa Escrow monies to the Settlement Fund, and for their use as payments to the Yurok Tribe, and to individual Yuroks, as provided in this Act.

(B) The Secretary, after determining the validity of the resolution transmitted pursuant to subparagraph (A), shall cause such resolution to be printed in the Federal Register.

(b) HOOPA VALLEY RESERVATION. – Effective with the partition of the joint reservation as provided in subsection (a), the area of land known as the "square" (defined as the Hoopa Valley Reservation established under section 2 of the Act of April 8, 1864 (13 Stat. 40), the Executive Order of June 23, 1876, and Executive Order 1480 of February 17, 1912) shall thereafter be recognized and established as the Hoopa Valley Reservation. The unallotted trust land and assets of the Hoopa Valley Reservation shall thereafter be held in trust by the United States for the benefit of the Hoopa Valley Tribe.

(c) YUROK RESERVATION. – (1) Effective with the partition of the joint reservation as provided in subsection (a), the area of land known as the "extension" (defined as the reservation extension under the Executive Order of October 16, 1891, but excluding the Resighini Rancheria) shall thereafter be recognized and established as the Yurok Reservation. The unallotted trust land and assets of the Yurok Reservation shall thereafter be held in trust by the United States for the benefit of the Yurok Tribe.

(2) Subject to all valid existing rights and subject to the adoption of a resolution of the Interim Council of the Yurok Tribe as provided in section 9(d)(2), all right, title, and interest of the United States –

(A) to all national forest system lands within the Yurok Reservation, and

(B) to that portion of the Yurok Experimental Forest described as Township 14 N., Range 1 E., Section 28, Lot 6: that portion of Lot 6 east of U.S. Highway 101 and west of the Yurok Experimental Forest, comprising 14 acres

more or less and including all permanent structures thereon, shall thereafter be held in trust by the United States for the benefit of the Yurok Tribe and shall be part of the Yurok Reservation.

(3)(A) Pursuant to the authority of sections 5 and 7 of the Indian Reorganization Act of June 18, 1934 (25 U.S.C. 465, 467), the Secretary may acquire from willing sellers lands or interests in land, including rights-of-way for access to trust lands, for the Yurok Tribe or its members, and such lands may be declared to be part of the Yurok Reservations.

(B) From amounts authorized to be appropriated by the Act of November 2, 1921 (42 Stat. 208; 25 U.S.C. 13), the Secretary shall use not less than $5,000,000 for the purpose of acquiring lands or interests in lands pursuant to subparagraph (A). No lands or interests in lands may be acquired outside the Yurok Reservation with such funds except lands adjacent to and contiguous with the Yurok Reservation or for purposes of exchange for lands within the reservation.

(4) The –

(A) apportionment of funds to the Yurok Tribe as provided in sections 4 and 7;

(B) the land transfers pursuant to paragraph (2);

(C) the land acquisition authorities in paragraph (3); and

(D) the organizational authorities of section 9 shall not be effective unless and until the Interim Council of the Yurok Tribe has adopted a resolution waiving any claim such tribe may

have against the United States arising out of the provisions of this Act.

(d) BOUNDARY CLARIFICATIONS OR CORRECTIONS. – (1) The boundary between the Hoopa Valley Reservation and the Yurok Reservation, after the partition of the joint reservation as provided in this section, shall be the line established by the Bissel-Smith survey.

(2) Upon the partition of the joint reservation as provided in this section, the Secretary shall publish a description of the boundaries of the Hoopa Valley Reservation and Yurok Reservation in the Federal Register.

(e) MANAGEMENT OF THE YUROK RESERVATION. – The Secretary shall be responsible for the management of the unallotted trust land and assets of the Yurok Reservation until such time as the Yurok Tribe has been organized pursuant to section 9. Thereafter, those lands and assets shall be administered as tribal trust land and the Yurok reservation governed by the Yurok Tribe as other reservations are governed by the tribes of those reservations.

(f) CRIMINAL AND CIVIL JURISDICTION. – The Hoopa Valley Reservation and Yurok Reservation shall be subject to section 1360 of title 28, United States Code; section 1162 of title 18, United States Code, and section 403(a) of the Act of April 11, 1968 (82 Stat. 79; 25 U.S.C. 1323(a)).

EXECUTIVE ORDERS

EXECUTIVE MANSION, *June 23, 1876.*

It is hereby ordered that the south and west boundaries and that portion of the north boundary west of Trinity River surveyed, in 1875, by C. T. Bissel, and the courses and distances of the east boundary, and that portion of the north boundary east of Trinity River reported but not surveyed by him, viz: "Beginning at the southeast corner of the reservation at a post set in mound of rocks, marked 'H. V. R., No. 3'; thence south 17½ degrees west, 905.15 chains, to southeast corner of reservation; thence south 72½ degrees west, 480 chains, to the mouth of Trinity River," be, and hereby are, declared to be the exterior boundaries of Hoopa Valley Indian Reservation, and the land embraced therein, an area of 89,572.43 acres, be, and hereby is, withdrawn from public sale, and set apart for Indian purposes, as one of the Indian reservations authorized to be set apart, in California, by act of Congress approved April 8, 1864. (13 Stats., p. 39.)

U. S. Grant.

EXECUTIVE MANSION, *October 16, 1891.*

It is hereby ordered that the limits of the Hoopa Valley Reservation in the state of California, a reservation duly set apart for Indian purposes, as one of the Indian reservations authorized to be set apart, in said State, by Act of Congress approved April 18, 1864, (13 Stats., 39), be and the same are hereby extended so as to include a tract of country one mile in width on each side of the Klamath River, and extending from the present limits of

the said Hoopa Valley reservation to the Pacific Ocean; *Provided, however,* That any tract or tracts included within the above described boundaries to which valid rights have attached under the laws of the United States are hereby excluded from the reservation as hereby extended.

BENJ. HARRISON.

Supreme Court, U.S.
FILED
APR 22 1996
CLERK

No. 95-1311

In The

Supreme Court of the United States

October Term, 1995

PIETRO PARRAVANO, et al.,

Petitioners,

v.

BRUCE BABBITT, et al.,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

BRIEF OF AMICUS CURIAE STATES OF CALIFORNIA, ALABAMA, ALASKA, FLORIDA, IDAHO, KANSAS, MASSACHUSETTS, MISSOURI, NEBRASKA, NEVADA, NEW YORK, NORTH DAKOTA, RHODE ISLAND, SOUTH DAKOTA, VERMONT, AND WYOMING IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

1. Whether the federal government may take, in derogation of a State's sovereign interests, a percentage of a State's fish and game and allocate it to an Indian tribe without any express authority in treaty, federal statute or executive order.

2. Whether a federal court may imply rights, not expressly granted by the Congress, for a priority allocation of fish in the Klamath River to non-treaty Indian tribes.

3. Whether the federal government may exercise jurisdiction over a State's fish and game *outside* of an Indian reservation for the benefit of an Indian tribe, particularly where Statehood precedes the creation of the Indian reservation.

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INTEREST OF AMICI CURIAE STATES

This case has placed the States of the Union in a serious conflict with the federal government over the role of the federal government in protecting resources for the benefit of Indian tribes. The decision below permits the Secretary of Interior, without the benefit of a treaty provision, statute or executive order, arbitrarily to allocate a set percentage of fish to be taken on-reservation by a non-treaty Indian tribe, where that tribe has no right to the allocation of fish in common with others under any treaty, law or order. The alarming import of the decision below is that the federal government need not look to Indian treaties to justify the federal regulation of fish and game resources *outside* Indian lands. Under the decision below, the federal government may preempt or override State regulation of fish and game *off-reservation* – on private lands, state lands or anywhere within a state where fish and game might have cause to migrate within the State – in violation of the Tenth Amendment of the United States Constitution.

Amici States have now, or may have in the future, non-treaty Indian reservations created by statute and/or executive order. In California, *all* reservations arose *after* statehood, none by treaty. Some of these States also have treaty Indians living on reservations, whose rights to hunt and fish, on- and off-reservation, are defined by the language and terms of the treaties entered into between these tribes and the United States. Many of these treaties were entered into *before* the statehood of the respective State, and the interests of the State, on- or off-reservation, were undoubtedly displaced to the extent that the treaty

specifies. However, this is not the case with Indian reservations created from the federal public domain or patented lands in an existing State of the Union. While the federal government may preempt certain state regulation on federal lands, including those reserved for the benefit of Indian tribes, no authority stands for the proposition that the federal government may allocate resources *outside those lands* for the benefit of those occupying the reservation. The decision below misreads the pertinent authorities, and thereby improperly expands the powers of the federal government, threatening sovereign State interests.

Amici States believe this Court must review and reverse the decision below in order to protect and preserve the States from federal intrusion where Congress has not spoken. Amici States further believe that Congress does not have the power under the Indian Commerce Clause of the United States Constitution to allow federal jurisdiction over a State's fish and game resources outside of an Indian reservation, for the benefit of the tribe on the Indian reservation, absent a pre-statehood treaty which specifically reserve such a right.[1] The

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[1] The unprecedented federal approach would also tend to eviscerate the consistent holding of this and other courts which hold that an off-reservation hunting and fishing right is not preserved, in the absence of specific savings language, when a reservation is diminished or disestablished. See, Oregon Department of Fish and Wildlife v. Klamath Tribe, 473 U.S 753, 768-770 (1985); Red Lake Band of Chippewa Indians v. Minnesota, 614 F.2d 1161, 1162 (8th Cir. 1980) aff'g., United States v. Minnesota, 466 F.Supp. 1382 (D. Minn. 1979), cert. den., 449 U.S. 905 (1980); State v. Hero, 282 N.W.2d 70, 71 (SD 1979). See, American Indian Law Deskbook (Conf. of Western Attys.

exercise of such jurisdiction violates the Tenth Amendment, which reserves powers not delegated to the federal government to the States.

SUMMARY OF ARGUMENT

The federal government has asserted in this case a power to allocate a set percentage or number of the fall Chinook run of salmon in the Klamath River to a non-treaty Indian tribe, arising from an "implied" right to a set amount of fish. The Court of Appeal decision permits the Secretary of Interior, without the benefit of a treaty provision, statute or executive order, arbitrarily to allocate a set percentage of fish to be taken on-reservation, where that tribe has no right to the allocation of fish in common with others under any treaty, law or order.

Amici States argue that the federal government may not preempt or override State regulation of fish and game *off-reservation*, as it has no power to do so, and any such assertion of a power is in violation of the Tenth Amendment of the United States Constitution. While this Court has recognized an implied right to water in the federal government for the benefit of Indian tribes, such rights implied from agreements or treaties with Indian tribes, this Court has never recognized a *Winters*-like implied

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Gen. 1993), 215-219. The decision below has the effect to accomplish by litigation what the tribes failed to accomplish in the Congress recently. S. 1526, the proposed Indian Fish and Wildlife Resources Management Act of 1994, would have established a federal authority to regulate off-reservation hunting and fishing, similar to what is sought here.

right for Indian tribes to a set amount of fish to be taken in common with others, particularly where the Indian reservations post-date the statehood of the State involved.

Amici States recognize that in this case, the federal government may displace state jurisdiction and regulatory interests *on-reservation*, and therefore, the Klamath River tribes have "federally-protected" fishing rights *on-reservation*. However, no tribe has, under this Court's jurisprudence, "federally-reserved" fishing rights that give rise to an allocation of the State's resources to be taken from the river and the state's coastal waters, except under certain adjudicated treaty cases. The Court of Appeals and the district court below relied on various Pacific Northwest treaty cases, where pre-statehood treaties reserved to the tribes rights to fish off-reservation "in common with all Citizens of the Territory," to conclude that non-treaty, post-statehood tribes warrant the same treatment and justify an allocation of fish in common with others. Absent a treaty akin to those in the Pacific Northwest, there is no basis to assume that the federal government has the authority to restrict off-reservation activities by third parties in order to guarantee that the tribes' opportunity to fish will provide a particular quantity of fish. There is no language in treaty, statute or executive order that supports the tribes receiving a priority "share" or "fair share" of the salmon, and thus, there is no power in the federal government to allocate fish as occurred in this case. The assertion of federal power in this case is a direct affront to the reserved powers of States to regulate and manage fish and game

not otherwise subject to prior treaty rights and not otherwise on the Indian reservation. This Court should grant review to reverse and rectify the improper displacement of State power by the federal government.

ARGUMENT

I.

THIS COURT SHOULD GRANT THE WRIT TO REVIEW A NEWLY- IMPLIED FEDERAL RIGHT TO A PRIORITY ALLOCATION OF FISH FOR A NON-TREATY INDIAN TRIBE, TO BE ENFORCED BY THE FEDERAL GOVERNMENT OFF-RESERVATION, WHERE THE STATUTES AND EXECUTIVE ORDERS GIVE RISE ONLY TO FEDERALLY-PROTECTED RIGHTS TO FISH ON-RESERVATION

Amici States urge this Court to grant certiorari to review important questions concerning the balance of federal-state power implicated by the findings and holdings of the district and circuit courts below. The lower courts upheld the emergency regulations of the Secretary of Commerce overruling the regulations of the Pacific Fisheries Management Council that set the Klamath fall chinook ocean harvest rate. *Parravano v. Masten*, 70 F.3d 539 (9th Cir. 1995) (*"Masten"*) (adopting the reasons and holdings of the district court); *Parravano v. Babbitt*, 861 F.Supp. 914 (N.D. Cal. 1994); *Parravano v. Babbitt*, 837 F.Supp. 1034 (N.D. Cal. 1994). Preliminarily, it should be noted that the Secretary of Commerce must manage the ocean fishery in the Exclusive Economic Zone (EEZ), from 3 to 200 miles seaward, under the provisions of the Magnuson Act, 16 U.S.C. § 1801 *et seq.*, and in a manner

consistent "with any other applicable law." 16 U.S.C. § 1854(a)(1)(B). The courts below held that "any other applicable law" included "[federal] obligations to Indian reservations with respect to fishing rights," *Masten*, at 547; *Parravano v. Babbitt*, 837 F.Supp. at 1042-44; *Parravano v. Babbitt*, 861 F.Supp. at 925, as defined in an opinion of the Solicitor of the Department of Interior, dated October 4, 1993. While it is clear that as a general proposition the federal government may regulate ocean fishing under the commerce power, its exercise of power in this instance is flawed by an improper characterization of the fishing rights of the Hoopa Valley and Yurok Indians.

As to the scope and import of the protected fishing rights of the non-treaty Indians in this case, the courts below relied heavily, if not exclusively, on the flawed opinion of the Interior Solicitor. Admitting that it was a matter of first impression, the Interior Solicitor not only drew the conclusion that non-treaty Indians are entitled to similar fishing rights as "treaty" Indians (without identifying *which* treaty or *which* treaty Indians), he presumed it was within the power of the federal government to "allocate" from the entire Klamath run, *on- and off-reservation*, the number or percentage of fish the non-treaty Indians are entitled to. The Solicitor drew on the facts, experience, and the interpretations of various Pacific Northwest Indian treaties and the case law interpreting those treaties to determine that the Klamath River Indian tribes, in the absence of a treaty, were entitled to not more than 50 percent of the salmon in the fall chinook run. The courts below followed the Solicitor's opinion and held that the Hoopa and Yurok Indians have "federally *reserved* fishing rights," (italics added) and that to protect

these rights, the restrictions on ocean fishing of salmon were justified. *Babbitt*, 861 F.Supp. at 924. However, a close examination of the facts and the cases on which this chain of assertions and conclusions is based indicates that there is no "reserved" right, as found in treaty cases, but only a "protected" right relating to the ability of the tribes to fish on the reservation *free from the interference of others*. The immunity from state regulation which these tribes enjoy for on-reservation fishing does not support a 50 percent allocation of the entire fall chinook run, a curtailment of ocean fishing, or any other federal interference in off-reservation fisheries for the benefit of non-treaty Indians fishing on-reservation.

II.

THIS COURT SHOULD GRANT THE WRIT TO RESOLVE AN IMPORTANT QUESTION OF FEDERAL LAW WHERE STATE SOVEREIGN INTERESTS ARE THREATENED

A. The Klamath River Tribes have only "federally-protected" on-reservation fishing rights, not "federally-reserved" fishing rights that give rise to an allocation of the State's resources in the river and in State coastal waters

The history of the Indian reservations on the Lower Klamath River in California is set forth in *Mattz v. Arnett*, 412 U.S. 481, 487-493 (1973). No treaty was concluded with the Klamath Valley tribes in California. The present Hoopa Valley Reservation, the Lower Klamath Reservation and the "connecting strip" (now part of the Yurok Reservation) were all created by executive orders after California became a State. *Mattz*, at 487-490, 493. Unlike

the tribes in the Columbia River Basin (or the Upper Klamath River in Oregon), the Klamath River tribes in California have no treaty fishing rights. Compare *Washington v. Washington State Commercial Fishing Vessel Assn.*, 443 U.S. 658, 675-685 (1979); *Oregon Dept. of Fish & Game v. Klamath Indian Tribe*, 473 U.S. 753, 773 (1985); *Kimball v. Callahan*, 493 F.2d 564, 566-567 (9th Cir. 1974).

The courts below held that a "federally reserved fishing right" for the Lower Klamath River Indians was confirmed in *United States v. Eberhardt*, 789 F.2d 1354 (9th Cir. 1986). In that case, however, both the defendants and the United States simply asserted that the tribes had federally reserved fishing rights. The federal government contended it had the authority to curtail those rights, at least as to commercial fishing, in order to protect the resource. The Court accepted the assertion of a federally reserved right, basing it on language in the state court decisions in *People v. McCovey*, 36 Cal.3d 517, 534 (1984) and *Arnett v. Five Gill Nets*, 48 Cal.App.3d 454, 461 (1975).[2]

Yet, the language in those state cases is overbroad dicta. The cases that established the principle that tribes acquired reserved rights in fishery and water resources when their Indian reservations were created, did so based on *treaties* between the tribes and the United States. In *United States v. Winans*, 198 U.S. 371, 381 (1905), which concerns fishing rights, the Court held that when tribes

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[2] In fact, *McCovey* speaks in terms of the "grant" of fishing rights, arising from congressional action authorizing the President to create the reservation for Indian purposes. 36 Cal.3d 517, 205 Cal. Rptr. 643, 685 P.2d 687, 697 (1984).

ceded lands to the United States in treaties or agreements, they (the tribes), *reserved certain rights to themselves*, including fishing rights. However, in *Winters v. United States*, 207 U.S. 564, 575-577 (1908), concerning water rights, the Court went further and *implied* federal reserved water rights, where they were not explicitly reserved, for the Fort Belknap Reservation for the consumptive purpose of agriculture to support the Indians. Because of the rule that agreements with tribes should be construed liberally in favor of the tribes, in neither case was the Supreme Court willing to construe the treaty as having failed to reserve such rights to the tribes if the rights were not specifically mentioned. This analysis was followed in *Menominee Tribe v. United States*, 391 U.S. 404, 405-406 (1968). Whether explicit or implicit, the "reserved rights" that these cases held were created when the reservation was created were rights reserved *by the tribes* from their sovereign rights when they entered into treaties or agreements with the United States in which lands were ceded and other concessions were made, and such rights operate only to the extent they exist. This Court has never held that a post-statehood establishment of a federal reservation gives rise to a *Winters*-like *implied* federal reserved *fishing* right, subject to allocation among others by the federal government.

Under the "equal footing" doctrine, once States are admitted to the Union, they acquire title to lands and waters not reserved in the public domain by the United States *prior to statehood*, thus placing them on an "equal footing" with the original States. See *United States v. New Mexico*, 438 U.S. 696, 698-703 and n. 4 (1978). The Supreme Court in *Winters* held that the "equal footing"

doctrine did not defeat the tribes' claim to reserved water rights created by a treaty entered into a year prior to statehood.

In *Arizona v. California*, 373 U.S. 546, 599-600 (1963), this Court found a different basis for "reserved water rights." Instead of relying on a *tribe*'s reservation of rights in a treaty (as in the instant case, there was no treaty), this Court found that the *federal government* had reserved water rights when it created the Indian reservations from the public lands. *Id.* Hence, the "reserved water rights" doctrine came to be based exclusively on *federal* sovereignty under the property clause and the commerce clause, rather than on Indian sovereignty. U.S. Const., art. I, § 3, art. IV, § 3(2). The arid conditions in most of the West, which would render many public lands useless without water, were fundamental to that decision. 373 U.S. at 597-600. However, this Court did not give the federal government plenary power to reserve water rights in this fashion. Indeed, the federal government's ability to assert such "reserved rights" in scarce resources is quite limited. See *Washington v. Washington State Commercial Passenger Fishing Vessel Assn.*, 443 U.S. at 685-686; *United States v. New Mexico*, 438 U.S. 696, 698-703 and n. 4, n. 7.

In any event, none of the cases referred to by the courts below dealing with reserved rights actually holds that the federal government may create "reserved *fishing* rights" through the establishment of a reservation, or that

such rights may be reserved other than by treaty.[3] Yet, the Interior Solicitor and the courts below concluded that the establishment of the reservation must have given rise in the tribe to a *priority*, before other user groups can be afforded fishing privileges. This astonishing leap of logic bestows a treaty-like priority in fish resources to the tribe where no law, treaty or authority stands for that proposition.

B. Non-Treaty Indians May Have Federally-Protected Rights to Fish *On the Reservation* In This Case

Both the distinction between treaty rights and statutory rights, and the timing of the creation of the reservation relative to statehood, are significant points, in light of the "equal footing" doctrine. The federal government may have created Indian reservations for the Klamath River tribes from federal public lands after California became a State, thus ousting the State of jurisdiction to enforce its fish and game laws on the reservation, *Mattz v. Superior Court*, 36 Cal.3d 355, 363-364, 372-373 (1988), except where necessary to preserve the resource. *Id.*, at 374, 376-380. But it did not, and could not, create a

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[3] While *Blake* v. *Arnett*, 663 F.2d 906, 909-910 (9th Cir. 1981), described the distinction between reserved rights created by treaty and those created by statute to be illusory, the point is dicta, because the actual holding of the case is that whatever right the Indians had in the lands adjoining the Klamath River, it was transferred to those who later acquired the land. *Id.* at 911. In any event, the discussion in *Washington* v. *Washington State Fishing Vessel Assn.*, which is clearly based on interpreting the rights the Washington State Indians reserved in a series of treaties, does not support a blurring of this distinction. 443 U.S. at 674-684.

"federally reserved fishing right," certainly not one that justifies restrictions on other activities, such as ocean fishing, that may impinge on the tribes' exercise of that right, after California became a State in the absence of a treaty. See *United States v. New Mexico*, 438 U.S. at 698, 705-713.

Again, this point is clearly illustrated by comparing the instant case to *Washington v. Washington State Commercial Passenger Fishing Vessel Assn.*, 443 U.S. 658. In that case, the United States had entered into a series of treaties to extinguish claims to land in the Columbia River Basin. 443 U.S. at 661-662. (One was the treaty interpreted in *United States v. Winans*, 198 U.S. 371, 381.) In all of them, the tribes reserved, by language of a treaty, a right to fish at usual and accustomed places "in common with all Citizens of the Territory." 443 U.S. at 674. It was this language which the state and federal courts interpreted as allowing "an equitable measure of the common right," leading to an allocation of a percentage of the salmon and steelhead runs to the treaty tribes. 443 U.S. at 678-685. Moreover, the allocations themselves were based on an extensive evidentiary record. *Id.* at 685-691. They were not pulled out of the air or based on cases from other areas with other factual circumstances, as is the case here.

III.

THIS COURT MUST SETTLE THE QUESTION WHETHER, IN THE ABSENCE OF A TREATY ALLOCATING RESOURCES TO AN INDIAN TRIBE, THE FEDERAL GOVERNMENT HAS ANY JURISDICTION TO PROVIDE FOR OFF-RESERVATION RESTRICTIONS OR ALLOCATIONS OF A STATE'S RESOURCES

Where the federal government may have ousted California of jurisdiction to enforce its fish and game laws against the Klamath Indians fishing *on their reservation* (except where necessary to protect a dwindling resource), in that since the Klamath tribes have a "federally guaranteed" fishing right by virtue of the creation of their reservations. This is a far cry from those situations in which the U.S. Supreme Court has found a *reserved* fishing right. A *reserved* fishing right may be created only through a treaty. Absent some treaty language creating a priority, or an in-common right, as in the Washington State cases, there is simply no basis for concluding that the tribes have a right to an *allocation* of Klamath River fish. See *Washington v. Washington State Commercial Passenger Fishing Vessel Assn.*, 443 U.S. at 685. Rather, they have a right to fish on their reservation and they enjoy an immunity from state fish and game laws on their reservation. No amount of legerdemain by the Interior Solicitor can supply the missing predicate.

Moreover, absent a treaty basis for the tribes' right, as in the Washington State cases, there is no basis to assume that the federal government has the authority to restrict off-reservation activities by third parties in order

to guarantee that the tribes' opportunity to fish will provide a particular quantity of fish.[4] While the Court of Appeals makes no note of it, the District Court acknowledged the "off-reservation regulation of a fishery pursuant to non-treaty based tribal fishing rights appears to be a matter of first impression. . . . " *Babbitt*, 861 F.Supp. at 924. In fact, any quantification of non-treaty federally reserved on-reservation Indian fishing rights has no precedent. The same district court cited *Blake v. Arnctt*, 663 F.2d 906, *United States v. Wilson*, 611 F.Supp. 813 (N.D. Cal. 1985) and *United States v. Walker River Irr. Dist.*, 104 F.2d 334 (9th Cir. 1939). These cases do not stand for the proposition that treaty and non-treaty rights are to be treated the same. In *Walker River*, this court simply followed *Winters* to imply an implied federal reservation of water for the benefit of the Paiute tribe with a priority dating from before Nevada became a State. The case does not stand for the broad proposition that non-treaty fishing rights are to be treated the same as treaty fishing rights. The decision in *Wilson* was eviscerated in part by the holding in *United States v. Eberhardt*, 789 F.2d 1354. The use of the term "reserved" rights is not essential to

[4] Other factors besides ocean fishing are sometimes thought to have affected the decline of North Coast salmon runs. Although the Solicitor's opinion mentions water diversions (primarily federal) on the Klamath and its tributaries as another candidate for remedial action, timber harvesting (particularly of old growth forest in spawning and rearing areas) on both private and National Forest land is also often named as a suspect. Presumably the "federally reserved fishing right" asserted here could be used to justify federal regulation of private, as well as federal, timber harvesting to protect the salmon runs.

Eberhardt – this Court of Appeals found there that the tribes had protected rights to fish, but that the general trust statutes in Title 25 furnished the Department of Interior with broad authority to supervise and manage Indian fishing *on the reservation*. *Eberhardt*, at 1360-1361.

What is significant, if not obvious, about treaty fishing rights as opposed to non-treaty rights is that they generally specify what the treaty tribe is retaining or reserving as a right to fish, as in the right to fish at "usual and accustomed places" "in common with all Citizens of the Territory." *Washington v. Washington State Commercial Passenger Fishing Vessel Assn.*, 443 U.S. at 674. The Solicitor and the district court here cannot read such language into a treaty that does not exist. By analogizing the Klamath River Indian fishing rights to federally-reserved water rights, and by applying the "fair share" and off-reservation aspects of Washington state *treaty* fishing rights to these non-treaty Indian fishing rights in California, the courts below have fashioned an extraordinarily expansive new power in the federal government relating to Indian affairs. When the Court of Appeals posits that the Tribe must receive its "fair share," 70 F.3d at 546, it is premised on the notion that the tribe has the right to a "share." With whom? and from what? *Treaties* typically reserve rights to the tribe to a share of fish "in common" with others in whatever geographic locations those others may be in, e.g., at "usual and accustomed places" off the reservation. The States and the non-Indian citizenry took their interests subject to these treaty rights. No such priority rights arise in a non-treaty situation. If non-treaty fishing rights indeed arise from the federal grant of rights in the creation of a reservation, then it is clear that the

federal government may regulate, manage and supervise that Indian fishery.

Existing constitutional powers to manage federal property do not, however, give the federal government power to regulate, manage and supervise non-Indian fisheries for the benefit of Indian fisheries, absent a treaty that compels it.[5] As noted, what is disturbing to the States in the decisions below, and in the Interior Solicitor's opinion that the decision tracks, is the logical extension that the federal government may rely on its general trust responsibilities to Indians and its property powers to justify the *federal* regulation of fish and game resources outside Indian lands. Under the reasoning of this decision, the federal government may preempt or override *state* regulation of fish and game off-reservation – on private lands, state lands or, presumably, anywhere that the federal government deems "linked" to an implied "reserved," higher-priority Indian right to fish or hunt. To the extent that such a reading of federal power permits the preemption of state regulation where no constitutionally-derived or treaty power grants it, it is violative of the Tenth Amendment, which reserves powers not delegated to the United States to the States.

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[5] The Supreme Court has recognized that even where the right is a treaty-based, in-common right, there are limits to how much of the resource may be allocated to the tribes. *Washington* v. *Washington State Commercial Passenger Fishing Vessel Assn.*, 443 U.S. at 684-687. See also *United States* v. *New Mexico*, 438 U.S. at 698-703 and n. 4, n. 7. However, where there is *no* treaty, and the reservation was created after statehood, there is no reserved right and no basis for *any* allocation.

CONCLUSION

For the reasons stated here, amici States urge this Court to grant the petition for writ of certiorari.

Respectfully submitted,

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NO. 95-1311

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1995

PIETRO PARRAVANO, WAYNE HEIKKILA, MARGUERITE DODGIN, EARL CARPENTER, DAVID BITTS, LIZ HENRY, NORMAN L. De VALL, PACIFIC COAST FEDERATION OF FISHERMEN'S ASSOCIATIONS, HUMBOLDT FISHERMEN'S MARKETING ASSOCIATION, CAITO FISHERIES, INC., GOLDEN GATE FISHERMEN'S ASSOCIATION, and SALMON TROLLERS MARKETING ASSOCIATION,

Petitioners,

v.

BRUCE BABBITT, as Secretary of the UNITED STATES DEPARTMENT OF THE INTERIOR, and in his individual capacity; RON BROWN, as Secretary of the UNITED STATES DEPARTMENT OF COMMERCE, and in his individual capacity, and Intervenor SUE MASTEN, member of the Yurok Indian Tribe,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENT SUE MASTEN IN OPPOSITION

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April 21, 1996

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QUESTION PRESENTED

Petitioners' statement of the questions purportedly presented by the Petition would have this Court grant review on an issue that the District Court specifically declined to decide in the absence of the Yurok and Hoopa Valley Indian Tribes, and which the Court of Appeals never addressed; i.e., quantification of the Tribes' fishing rights that the United States reserved when it established Indian Reservations along the Klamath River. Petitioners also seem to be attempting to resurrect an issue that the Court of Appeals specifically found that Petitioners had abandoned; i.e., whether the Secretary of Commerce's management of ocean salmon harvests so as to make some fish available for on-Reservation harvest by Tribal fishers exercising federally-reserved fishing rights constitutes impermissible racial discrimination.

In fact, there is only one issue involving the federally-reserved fishing rights of the Yurok and Hoopa Valley Tribes that Petitioners properly may present to the Court:

> Do the on-Reservation fishing rights of the Yurok and Hoopa Valley Indian Tribes, having been reserved by Presidential Executive Orders issued pursuant to statutory authorization and confirmed by the Hoopa-

QUESTION PRESENTED - Continued

Yurok Settlement Act, 25 U.S.C. Sec. 1300i, et seq., constitute "any other applicable law" within the meaning of the Magnuson Act, 16 U.S.C. Sec. 1801, 1853(a)(1)(C) and 1854(a)(1)(B), that the Secretary of Commerce lawfully may consider in formulating and implementing plans for the management of the harvest of salmon between three and 200 miles off the coast of Northern California?

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STATUTES INVOLVED

Petitioners omitted from their statement of the statutes and other sources of federal law involved in this case two highly relevant provisions of the Hoopa-Yurok Settlement Act ("HYSA") of 1988, 25 U.S.C. Sec. 1300i, et seq., and included an obsolete version of a third.[1] Those provisions of the HYSA are, respectively:

Sec. 1, 25 U.S.C. Sec. 1300i(b)(1)(G);

Sec. 5, 25 U.S.C. Sec. 1300i-4(e);

Sec.12 , 16 U.S.C. Sec. 460ss-3.

The text of these provisions is set forth in the Appendix hereto.

STATEMENT OF THE CASE

Petitioners' Statement of the Case is so rife with gross errors, distortions, omissions and outright misstatements as to render it completely unreliable as the basis for the Court's decision whether to grant the writ sought by Petitioners. These errors begin in the first

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[1] The provisions of the Klamath River Basin Restoration Act, 16 U.S.C. Sec. 460ss-2(c), set forth at p. 92 of Petitioners' Appendix. were amended by Section 12 of the HYSA so as to give both the Yurok and Karuk Tribes seats on the Klamath Fishery Management Council.

paragraph of the Petition and pervade virtually every succeeding paragraph. The most egregious of Petitioners' errors, omissions and/or misstatements are as follows:

1. Paragraph one, page two of the Petition gives the impression that Petitioners have been altogether prohibited from catching salmon in the ocean off the coast of California since April, 1993. This is manifestly false. As the District Court found, and Petitioners agreed, the Secretary of Commerce issued the emergency regulations at issue herein in order to allow the opening of the ocean troll salmon fishery between 3-200 miles offshore.[2]

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[2] "All parties agree that once the Secretary rejected the Council's recommendations, the fishing season, scheduled to open May 1, 1993, could not go forward unless the Secretary promulgated substitute emergency regulations.[fn. omitted]." Petitioner's Appendix, p. 82. Out of concern for the conservation needs of the natural stocks in the Klamath River system (in the preceding three years, spawning escapement levels had been barely one-third of the minimum spawning escapement floor established in the Ninth Amendment to the Framework Management Plan for the salmon fisheries off the coasts of California, Oregon and Washington), and taking into account the projected minimum subsistence harvest by Indian fishers on the Yurok and Hoopa Valley Reservations, the Secretary of Commerce opted to reduce by .5% the lower of two ocean harvest rate options identified by the advisory Pacific Fisheries Management Council ("PFMC"). To attain that objective for the long-term health of the resource, the Secretary merely shortened the ocean commercial troll season by one week, and reduced the quota for the recreational fishery.

2. Contrary to Petitioners' contention at page two, paragraph two of the Petition, the Secretary of the Interior and the Interior Solicitor did not assert that the Indian fisheries within the Reservations along the Klamath River "are entitled to 50% of all chinook salmon from that river." Rather, Interior's actual position was -- and remains -- that,

> ... the fishing rights reserved for the Tribes include the right to harvest quantities of fish on their reservations sufficient to support a moderate standard of living. I also conclude that the Tribes' entitlement is limited to fifty percent of the harvest in any given year unless varied by agreement of the parties. [Emph. added].

Interior Solicitor's Opinion No. M-36979, October 4, 1993; ER 125, 127. Relying upon the contemporary reports that accompanied the recommendations for establishment of the Reservations, extensive judicial precedent and Interior Department decisions and opinions dating back to 1904,[3] the

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[3] The Interior Solicitor reviewed every significant Interior Department decision, judicial opinion and previous Solicitor's Opinion discussing the purposes of the Reservations and the role of fishing in the lives of the beneficiaries of the Reservations along the Klamath River, beginning with Crichton v. Shelton, 33 I.D. 205, 217 (1904) ("... the prevailing motive for setting apart the [Klamath River] reservation was to secure to the Indians the fishing privileges of the Klamath river"). ER 139-140, notes 27, 28.

Interior Solicitor correctly concluded that,

> "the United States was well aware of the Indians' dependence upon the fishery. A specific, primary purpose for establishing the reservations was to secure to the Indians the access and right to fish without interference from others [fn. om.] As against third parties, the Indians' reserved fishing rights were of no less weight because they were created by executive orders pursuant to statutory authority rather than by treaty.[fn. om.] Courts have uniformly rejected a "treaty vs. non-treaty" distinction as a basis for treating Hoopa and Yurok fishing rights differently from the treaty-reserved fishing rights of tribes in other areas of the United States.[fn. om.]

Notwithstanding this position, in 1993 the Secretary of the Interior agreed to limit the Indian in-River harvest to only 45% of the harvestable portion of the run, rather than the 50% that the Yurok Tribe had requested. ER 104. The actual Tribal harvest was about half that amount. Masten's Supplemental Excerpt of Record ("SER") 27.

3. Contrary to Petitioners' characterization in paragraph one, page three of the Petition, the Secretary of Commerce's emergency regulations did not require "that ocean fisheries in an area several hundred miles around the mouth of the Klamath would be closed to fishing on all salmon stocks in an effort to provide this 50% Indian share

plus spawning escapement[.]"[4] Petitioners also are wrong in contending (paragraph one, page three) that the Secretaries of Commerce and Interior "granted" any fishing rights to the Reservation Tribes. As noted above, the fishing rights that the Secretaries recognized had been unequivocally confirmed by the courts in 1976 [Arnett v. Five Gill Nets, 48 Cal.App.3d 454 (1975), cert. denied, 425 907 (1976)], 1981 [Blake v. Arnett, 663 F.2d 906 (9th Cir. 1981)], 1984 [People v. McCovey, 36 Cal.3d 517, cert. denied, 469 U.S. 1062 (1984)], 1986 [United States v. Eberhardt, 789 F.2d 1354 (9th Cir. 1986)], and 1988 [Mattz v. Superior Court, 46 Cal.3d 355 (1988)], and reconfirmed by Congress in 1988

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[4] Based upon the PFMC's pre-season projections of the 1993 fall run size, and the failure in the previous three years to meet the PFMC's minimum spawning escapement goals, the Secretary's restrictions would have been amply justified even without consideration of the needs of the Tribal in-River fisheries. Of the 55,671 fish that actually escaped ocean harvest to return to the Klamath River in 1993, only 20,880 were wild fish, 15,000 fewer than the spawning escapement floor. The Tribal harvest was only 9,636 fish, about half of the pre-season projection and about 3,000 fewer than the Tribes' emergency subsistence needs. In contrast, the in-River sport fishery harvested 3,587 fish, 132.8% of the pre-season projection. As in previous years since 1978, the Indian in-River harvest was but a small fraction of the total in-River run, and was minuscule in comparison to the actual ocean harvests in those same years. SER pp. 10-15, 21-27.

in the HYSA.[5]

4. Petitioners' assertion, at paragraph three, page three of the Petition, that the Secretaries imposed a "total closure" on the non-Indian fisheries, "while authorizing Indian fishers to use net gear in river spawning areas, illegal for non-Indians," is unsupported by and contrary to the record. Moreover, it completely ignores the fact that because of overharvests in the ocean, the Secretary of the Interior banned all commercial fishing by Reservation Indians between 1978 and 1987 (see, e.g., United States v. Eberhardt, supra), and that between 1934 and 1976, the State of California unlawfully prohibited Reservation Indians from exercising their federally-reserved rights to fish in the Klamath River and other Reservation waters. See, e.g., Arnett v. Five Gill Nets, supra; People v. McCovey, supra; Mattz v. Superior Court, supra; Calif. Fish & Game Code Sec. 8434.

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[5] "It is alleged that the 'Square', to be partitioned to the Hoopa Valley Tribe, is much more valuable than the 'Addition' which is to go to the Yurok Tribe. Tribal revenue from the 'Square' is in excess of $1,000,000 annually. Tribal revenue derived from the 'Addition' only totals about $175,000 annually. However, the record shows that individual Indian earnings derived from the tribal commercial fishing right appurtenant to the 'Addition' is also in excess of $1,000,000 a year." H.Rep. 100-938, 100th Cong., 2d Sess., Part 1 (1988), at 20.

5. Contrary to Petitioners' description of the history of the Klamath River's salmon fishery (Petition, pp. 4-5), the non-Indian ocean trollers' total monopoly on commercial salmon fishing began in 1934, when the State of California abolished the Reservation in-River fishery under Calif. Fish & Game Code Sec. 8434.[6]

Non-Indian coastal communities dependent upon the ocean salmon harvest have suffered adverse economic impacts in recent years, but that suffering was inevitable because of calamitous declines in Klamath River salmon stocks due to ocean overharvests and destruction of spawning habitat, not belated federal protection of Indian

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[6] This statute banned the use of gill nets and the sale of fish caught in the Klamath River District. Decades later, after California's courts had acknowledged that Yuroks and other Indians possess federally-reserved fishing rights that the State lacks jurisdiction to regulate or abridge, see Arnett v. Five Gill Nets, supra, the State of California persisted in its efforts to suppress the Tribal fishery by felonizing the sale or possession for sale of salmon taken by gill net in the waters of the Klamath River or its tributaries. Calif. Fish & Game Code Secs. 8685.5, 8685.6, 8685.7. The California Supreme Court's decisions in People v. McCovey, supra, and Mattz v. Superior Court, supra, which both affirmed the substantive existence of the Indians' fishing rights and held that California had no jurisdiction to prosecute Reservation Indians for the off-Reservation sale of fish caught in Reservation waters, arose from the prosecution of Reservation Indians for violating those statutes, among others.

fishing rights. Cases such as United States v. Eberhardt demonstrate that economic losses to non-Indian coastal communities would have begun years earlier and would have been much more severe had the Secretary of Commerce's predecessors not persisted -- over the objections of the Yurok and Hoopa Valley Tribes and the Secretary of the Interior -- in shifting almost the entire burden of conserving the Klamath River's salmon resources to the in-River Tribal fisheries. Petitioners cannot be allowed to so cavalierly ignore either the decades of devastating social, cultural and economic hardships inflicted upon Tribal communities by the previous salmon management policies of the State of California and the Department of Commerce, or the fact that ocean trollers can target different species of fish or transfer their fishing efforts to other areas, while Indian fishers, who can exercise their fishing rights only in Reservation waters, have no such flexibility. Masten's SER 5, 11.

6. Petitioners' statement (at page six of the Petition) that, "The court below projected losses of 89,000 chinook to produce 1,100 additional Indian harvest" is inaccurate, and also ignores the legal and biological imperatives inherent in managing mixed-stock ocean fisheries to protect the weakest natural runs, as required by the Magnuson Act. See, e.g.,

Washington Crab Producers v. Mosbacher, 924 F.2d 1438 (9th Cir. 1990).

In its November 3, 1993 Order, the District Court did not project that any fish actually would be "lost." Rather, the District Court noted only that the ocean fishery would not be able to harvest those fish; nothing in the record or common sense even suggests that the fish that were to be allowed to survive ocean harvest would not be available for ocean harvest in a subsequent season, or escape ocean harvest altogether and thus be available for harvest or spawning in other rivers of origin.

Second, and perhaps more significantly, the District Court specifically found that the Secretary of Commerce was not restricted to using a formal cost-benefit analysis based upon strict numerical comparisons between the number of fish from all stocks escaping ocean harvest and the number of natural spawners likely to return to the Klamath River system in developing his salmon management plans for mixed-stock ocean fisheries. Rather, the District Court held that the Secretary had a rational basis for concluding that preservation of Klamath River-origin natural spawners for future generations would provide the "greatest overall benefit to the Nation" consistent with the requirements of the

Magnuson Act, 16 U.S.C. Sec. 1802(21), and thus that the District Court could not, consistent with the Magnuson Act, substitute its own judgment for that of the Secretary of Commerce. Parravano v. Babbitt, 837 F. Supp. 1034, 1045 (N.D. Calif. 1994).

7. Petitioners' claims that the Department of the Interior does not vigorously enforce its regulations, and that Indians who are not members of either the Yurok or Hoopa Tribes are allowed to exercise Tribal fishing rights (Petition, p. 6, notes 7 and 8) are unsupported by and contrary to the record; indeed, the claims are absolutely false, and Petitioners know it. Also, there is no evidence in the record that the Department of the Interior "allows" Karuk Indians to fish further up the Klamath River, whatever fishing rights the Karuk Tribe may claimed to have lost under the HYSA.

8. Petitioners' account (Petition, pp. 7-8) of the history of the Reservations along the Klamath River omits any mention of the Acts of March 3, 1853 (10 Stat. 226, 238) and March 3, 1855 (10 Stat. 686, 699), which authorized the President to issue the 1855 executive order establishing the original Klamath River Reservation for Indian purposes. Mattz v. Arnett, 412 U.S. 481(1973). Petitioners also fail to mention that all three of the Executive Orders by which the

Reservations along the Klamath and Trinity Rivers first were established for Indian purposes were based upon proposals that described the territory and the abundance of fish upon which the Indians depended for their sustenance. See, e.g., I Kappler, Indian Laws and Treaties 816; see also, Mattz v. Arnett, supra.[7]

Petitioners accurately note that in Mattz v. Arnett, supra, this Court ordered that the issue of Indian fishing rights be addressed on remand, but incorrectly describe either the immediate outcome on remand, or subsequent judicial decisions confirming that outcome. The State of California argued on remand that it had jurisdiction to regulate fishing by Tribal members in Reservation waters under 18 U.S.C. Sec. 1162 (P.L. 83-280), because that statute exempted from State jurisdiction only hunting and fishing rights based upon treaties, statutes or agreements, not executive orders.[8] The

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[7] "The site was ideally selected for the Yuroks. They had lived in the area; the arable land, though limited, was 'peculiarly adapted to the growth of vegetables,' [cit.om.]; and the river, which ran through a canyon its entire length, abounded in salmon and other fish." Id., at 487.

[8] 18 U.S.C. Sec. 1162(b) provides that,
"Nothing in this section ... shall deprive any Indian or any Indian tribe, band, or community of any right, privilege, or immunity afforded under Federal treaty, agreement, or statute with respect to hunting, trapping, or fishing or the control, licensing, or

California Court of Appeal expressly rejected that argument, holding that the fishing rights of the Indians of the then-unified Hoopa Valley Reservation were traceable to the statutes that had authorized the President to create Reservations "for Indian purposes," and thus that the Indians' fishing rights were based on statute for the purposes of P.L. 83-280. For that reason, the court declined to decide whether an executive order was an "agreement" within the meaning of P.L. 83-280.

This Court proceeded to deny the State's petition for a writ of certiorari. Arnett v. Five Gill Nets, 48 Cal. App. 3d 454 (1974), cert. denied, 425 U.S. 907. In subsequent cases in which the State of California and others made essentially the same arguments that Petitioners are making here, the reasoning and result in Arnett v. Five Gill Nets consistently has been confirmed. See, e.g., Blake v. Arnett, supra, People v. McCovey, supra, United States v. Eberhardt, supra, and Mattz v. Superior Court, supra.[9] In the HYSA,

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regulation thereof."

[9] People v. McCovey and Mattz v. Superior Court both involved prosecution of Yuroks for the off-Reservation sale of fish caught in Reservation waters. Petitioners' casual dismissal (Petition, p. 22) of the significance of these and the other cited cases is as inexplicable as it is indefensible.

Congress concurred the courts' conclusions.

Petitioners' claim that the HYSA does not mention fishing rights (Petition, page 9), is extremely misleading. Although the statute does not use the phrase "fishing rights," it clearly refers to funds derived from commercial fishing [25 U.S.C. Sec. 1300i(b)(1)(g)], and the legislative history specifically enumerates valuable Tribal interests in the Klamath River fishery as among the assets of the Reservation being partitioned; indeed, Congress considered those rights to comprise the principal value of the Yurok Reservation. S. Rep. 564, 100th Cong., 2d Sess. at 2, 25-26 (1988); H.Rep. 938, P.t. 1, 100th Cong., 2d Sess. at 20 (1988); see also, 25 U.S.C. Sec. 1300i-1(b) and (c). Moreover, Section 12 of the HYSA, codified at 16 U.S.C. Sec. 460ss-3, grants the Yurok Tribe representation on the Klamath River Basin Task Force.

Proceedings Below.

By their Amended Complaint in this action, Petitioners sought, inter alia, a judgment declaring that the Yurok and Hoopa Valley Indian Tribes have no federally-reserved right to fish in the waters of their Reservations; enjoining the Secretary of Commerce from considering the federally-reserved on-Reservation fishing rights of the Yurok

and Hoopa Valley Tribes as "any other applicable law" which the Secretary of Commerce could consider in regulating the ocean harvest of salmon under the Magnuson Act; and enjoining the Secretary of the Interior from allowing members of the Yurok and Hoopa Tribes to fish in the waters of their own Reservations. Amended Complaint, ER 99-102.[10]

Sue Masten is a member of the Yurok Tribe whose family has sustained itself for generations by fishing in the lower Klamath River on what now is part of the Yurok Indian Reservation, and who continues to fish in those waters for economic, ceremonial and cultural purposes. Ms. Masten moved to intervene and to dismiss under F.R.Civ.P. 19, based upon Petitioners' failure to join the Yurok Tribe as an indispensable party to an action to quantify Tribal fishing rights.

The District Court granted Ms. Masten's motion to

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[10] Petitioners prayed for orders declaring, "that the proposed allocation of fish away from Plaintiffs to 'in-river Indian' Klamath River fisheries are illegal and unconstitutional[,]" and "Enjoining Babbitt and others acting in concert with him, including those fishing pursuant to Interior regulations adopted for Klamath River fisheries from any fishing in the Klamath River which would take salmon necessary for spawning escapement as determined by the PFMC." ER 100-101.

intervene, but denied her motion to dismiss on the grounds that the Court specifically refused to allow the quantification of the Tribal rights in the Tribes' absence. Pet. App. at 22, n. 3. Petitioners fail to mention Masten's intervention, the District Court's determination that the Yurok and Hoopa Tribes would be indispensable parties to any action to quantify their federally-reserved fishing rights, and that Petitioners did not appeal from the District Court's ruling on the indispensability of the Tribes.

ARGUMENT

Petitioners purport to posit six reasons for granting their Petition.[11] Because the first five of Petitioners' stated

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[11] In Petitioners' own words, the reasons are:

1. Indian Treaty Rights are Special and May Not Be Implied;

2. Conflicts or Inconsistent Circuit Court Decisions;

3. The Court Expressly Adopts A Rule of Construction at Odds with This Court's Precedents;

4. The Decision Contradicts Long-Standing Administrative and Congressional Interpretation;

5. The Lower Court's Decision Destroyed the Livelihood of Fishermen and Coastal Communities and Wasted Salmon; and

6. Numerous Tribes in the Ninth Circuit Have Similar Claims, Affecting All Pacific Ocean Fisheries. The Court of Appeals erred in holding that the Magnuson Act allows the Secretary of Commerce to consider on-Reservation fishing rights reserved by executive orders issued pursuant to statutes are entitled to the same consideration as treaty-based off-Reservation fishing rights.

reasons for review inaccurately portray the decision of the Court of Appeals, and because the sixth lacks legal significance under the Magnuson Act, there is no cognizable reason why the Petition should be granted.

A. The Court of Appeals properly applied existing precedent from this Court and other federal courts in concluding that the statutes and Executive Orders upon which the on-Reservation fishing rights of the Yurok and Hoopa Valley Tribes are based constitute "any other applicable law" within the meaning of the Magnuson Act.

The fundamental flaw in Petitioners' attack on the decision of the Court of Appeals is Petitioners' rigidly myopic and erroneous equation of the Magnuson Act's references to "any other applicable law" to "Indian treaty fishing rights," 16 U.S.C. Secs. 1853(a)(1), (a)(2), and 1854(A). That the two phrases are not synonymous is obvious not only from the plain language of the Magnuson Act and the context in which the phrases appear, but also from previous authoritative interpretations of these phrases by the Court of Appeals.

The Magnuson Act grants the Department of Commerce broad regulatory authority over commercial and

recreational fishing in coastal waters, on or near the Continental Shelf appertaining to the United States, and on the high seas from three to 200 miles offshore. 16 U.S.C. Sec. 1801(a), (b). The Magnuson Act does not grant the Department of Commerce any regulatory authority over Indian or non-Indian in-River fisheries, even if the fish involved are anadromous and Indians are fishing in the exercise of federally-reserved fishing rights. Washington Crab Producers v. Mosbacher, supra; Pacific Coast Federation of Fishermen's Associations v. Secretary of Commerce, 494 F.Supp. 626 (N.D. Calif. 1980); see also, United States v. Eberhardt, supra.

16 U.S.C. Sec. 1853 specifies the required and discretionary contents of any fishery management plan prepared by a Fisheries Management Council or by the Secretary of Commerce with respect to any fishery within the jurisdiction of the Secretary of Commerce. Section 1853(a)(1)(C) requires any such plan to "contain the conservation and management measures, applicable to foreign fishing and fishing by vessels of the United States, which are -- ... (C) consistent with the national standards, the other provisions of this Act, and any other applicable law. [emph. added]." Section 1853(a)(2) requires the plan to

"contain a description of the fishery, including, but not limited to, ... the nature and extent of foreign fishing and Indian treaty fishing rights, if any." 16 U.S.C. Sec. 1854(a) requires that the Secretary of Commerce, after receiving a fishery management plan (or amendment to a plan) prepared by a Fishery Management Council, "immediately commence a review of the management plan or amendment to determine whether it is consistent with the national standards, the other provisions of this Act, and any other applicable law[.]"

In Washington Crab Producers v. Mosbacher, supra, the Court of Appeals exhaustively analyzed both the meaning of the Magnuson Act language at issue in this case, and the proper role of the courts in reviewing the Secretary of Commerce's ocean fishery management decisions. As to the latter, the Court of Appeals stressed that a decision of the Secretary of Commerce may not be overturned unless it is arbitrary, capricious, an abuse of discretion or otherwise contrary to law ("Our only function is to determine whether the Secretary has considered the relevant factors and articulated a rational connection between the facts found and the choice made.' [Cit. om.]" Id., at 1441.

As to the meaning of "any other applicable law," the Court of Appeals held that the phrase includes any other law

that could impact the resource -- in the ocean or elsewhere:

> "Applicable law on conservation and management holds that '[n]either the Indians nor the non-Indians may fish in a manner so as to destroy the resource or preempt it totally.'" Id., at 1445.

Finally, the Court of Appeals held that "Indian treaty fishing rights" as used in 16 U.S.C. Sec. 1853(a)(2) means ocean -- i.e., off-Reservation, and thus necessarily treaty-based -- Indian fishing rights that must be described (and accommodated) by the Secretary of Commerce ocean fishery management plans. Defining "Indian treaty fishing rights" in such a manner is perfectly consistent with considering and accommodating harvests under on-Reservation fishing rights based upon statutorily-authorized Executive Orders to be "any other applicable law" when developing and evaluating ocean fishery management plans. Indeed, formulation of effective management measures for the ocean fishery is impossible without considering the projected impact on anadromous fish stocks of the in-River exercise of reserved Tribal fishing subject to the jurisdiction of Tribal governments or the Department of the Interior. Washington Crab Producers v. Mosbacher, supra.

B. The decision of the Court of Appeals is completely consistent with the decisions of other federal Circuits.

Petitioners' contention that the decisions of two other Circuits "conflict in principle" (Petition, p. 19) with the decision of the Court of Appeals in this case is nothing more than a desperate attempt to create the illusion of a conflict among federal circuits where no such conflict exists. Petitioners' reference to Shoshone-Bannock Tribes v. Reno, 56 F.3d 1476 (D.C. Cir. 1995), is mystifying, because that case did not involve the existence, nature or scope of an on-Reservation natural resource right, nor did it determine that reserved rights based on executive orders differ from such rights based on treaties.[12]

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[12] "The Tribes' claim to a water right in this case did not pertain to land within its Reservation boundaries, nor, so far as we can tell, did the claim derive from the government's withdrawal of land from the public domain and its reservation for a particular purpose. The Tribes' claim dealt instead with the 'unoccupied lands of the United States so long as game may be found thereon,' and the Tribes' treaty right to 'hunt' on those unoccupied lands outside its Reservation... The question is whether federal courts have the authority to force the United States to pursue this claim on the Tribes' behalf." 56 F.3d at 1480. The Circuit Court held without a treaty provision or statute specifically or implicitly obligating the United States to assert and pursue the claim, the Attorney General's decision not to pursue the Tribes' claim was within her discretion, and thus not subject to judicial review.

Petitioners' reference to Crow Tribe v. Repsis, 73 F.3d 982 (10th Cir. 1995), is equally baffling. That case involved interpretation of a treaty provision temporarily reserving the right of Tribal members to hunt on public lands outside the boundaries of their Reservation, not a permanent on-Reservation right reserved by an executive order issued pursuant to statutory authorization. Thus, the result in that case has no application here.

Petitioners' argument that the "Equal Footing" doctrine precluded the United States from making any post-Statehood reservation of on-Reservation natural resource rights for Indian beneficiaries has been rejected by this Court as a general proposition, see, e.g., Arizona v. California, 373 U.S. 546 (1963), decree entered 376 U.S. 340 (1964), modified 439 U.S. 419 (1979), further modified 460 U.S. 605 (1983), and by numerous other courts in the specific context of the reserved fishing rights of the Indians of the Reservations along the lower Klamath River. Arnett v. Five Gill Nets, supra; People v. McCovey, supra; Mattz v. Superior Court, supra.

C. The Court of Appeals applied the proper canon of construction to the statutes and executive orders creating the Yurok and Hoopa Valley Reservations.

Ignoring the fact that the Executive Orders creating the Klamath River and Hoopa Valley Reservations were issued pursuant to express statutory authorization, and that Congress subsequently confirmed the fishing rights of the Yurok and Hoopa Valley Tribes in the HYSA, Petitioners fault the Court of Appeals for applying to those Executive Orders the same rule of construction as this Court consistently has applied to the interpretation of treaties and statutes; i.e., that ambiguities are to be construed in the manner most beneficial to the Indians so as to effectuate the purposes for which the Reservations were created.

This case does not require the Court to decide what the rule of interpretation should be for executive orders unanchored in statutory authorization, because the rights at issue in this case already have been found to be anchored in statute. Mattz v. Arnett, supra; Blake v. Arnett, supra; Arnett v. Five Gill Nets, supra; People v. McCovey, supra; Mattz v. Superior Court, supra; United States v. Eberhardt, supra. This Court consistently has interpreted statutes intended to benefit Indians according to the same rules of construction as

it has applied to treaties with Tribes. See, e.g. Antoine v. Washington, 420 U.S. 194 (1975); Bryan v. Itasca County, 426 U.S. 373 (1976); California v. Cabazon Band of Mission Indians, 480 U.S. 202 (1987). The Court of Appeals cannot be faulted for adhering to those same principles in order to give effect to the purposes for which the Reservations were created. Donnelly v. United States, 228 U.S. 243, modified on rehearing, 228 U.S. 708 (1913);[13] Arnett v. Five Gill Nets, supra.

D. The decision of the Court of Appeals is consistent with administrative and Congressional interpretations of both the Magnuson Act and the statutes and Executive Orders creating the Yurok and Hoopa Valley Reservations.

When the State of California petitioned this Court for review of the decision of the California Court of Appeal on remand in Arnett v. Five Gill Nets, supra, Solicitor General

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[13] In its original decision in Donnelly, the Court held that several California statutes had declared the Klamath River to be non-navigable, thus conveying title to the bed of the Klamath River to the United States. On rehearing, the Court, "recall[ed] so much of the opinion as holds that 'by the acts of the legislation mentioned, as construed by the highest court of the state, *** California has vested in the United States, as riparian owner, the title to the bed of the Klamath, if in fact, it be a navigable river." That matter, therefore, we leave undecided." 228 U.S. at 711-712.

Bork made the following argument to this Court in opposition to the State's petition:

> That executive orders played a prominent role in the creation of the [Hoopa Valley] Reservation does not change this result. Regardless of the manner in which a reservation is created the purpose is generally the same: to create a federally-protected refuge for the Tribe...
>
> With respect to fishing rights we see no reason why a reservation validly established by executive order should be treated differently from other reservations.

Pet. App. 10-11.

Shortly after this Court denied the State's petition for a writ of certiorari in Arnett v. Five Gill Nets, the Secretary of the Interior promulgated initial interim regulations to govern Indian fishing in the waters of the unified Hoopa Valley Reservation. Those regulations, now codified at 25 C.F.R. Part 250, originally allowed limited commercial fishing, but in 1978 the Secretary imposed a "moratorium" on commercial fishing that lasted for nine years, even though Interior's regulations bemoaned the Secretary of Commerce's failure to curtail the overharvest of Klamath River salmon in ocean waters). See, People v. McCovey, supra; United States v. Eberhardt, supra; Mattz v. Superior Court, supra. Thus, Petitioners clearly are wrong to suggest

that the decision of the Court of Appeals is inconsistent with the position consistently articulated by the Secretary of the Interior for nearly twenty years.[14]

Although the Secretary of Commerce was much slower to meaningfully accommodate the reserved fishing rights of the Tribes along the Klamath River (the PFMC has been slower still), Petitioners cannot deny that the Department of Commerce recognized and even accommodated the existence of those rights to some extent. Petition, p. 24. See also, Pacific Federation of Fishermens' Associations v. Secretary of Commerce, supra. Moreover, the Secretary of Commerce consistently has taken the position that the Magnuson Act requires that ocean harvests

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[14] Petitioners also are incorrect in ascribing to the Solicitor and to the Court of Appeals reliance upon Washington v. Fishing Vessels Association, 443 U.S. 658 (1979), and Washington State Charterboat Association v. Baldridge, 702 F.2d 820 (9th Cir. 1983), for their respective determinations that Tribal fishing rights exist. The Solicitor used Washington v. Fishing Vessels Association "moderate living" standard for guidance in quantifying the Tribes' reserved rights, but the Court of Appeals did not cite that case at all. The Court of Appeals relied upon Washington Charterboat Association v. Baldridge only for its determination that the Magnuson Act was not intended to abrogate or modify Tribal fishing rights, and thus that the Secretary could treat such rights as "other applicable law" whether such rights are based on treaties or executive orders issued pursuant to statute.

of salmon must be managed to protect the weakest natural runs in each river to which salmon return to spawn,[15] even if the result is that off-Reservation ocean treaty Indian fishers occasionally may harvest more than their fair share of fish in a particular season. See, Washington Crab Producers v. Baldridge, supra. The Secretary of Commerce did nothing different in this case.

E. Any decline in Petitioners' economic welfare is attributable to declines in salmon resources, not the decision of the Court of Appeals.

As already noted, the precarious condition of the Klamath River's natural salmon resources going into the 1993 season would have justified severe curtailment the ocean harvest of salmon even if there had not been an Indian fishery in the Klamath River. As Judge Beezer made clear in his concurrence in the judgment in United States v. Eberhardt, supra, ocean overharvest and habitat destruction had forced Interior to suppress the Tribal harvest out of concern for the long-term survival of the resource.

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[15] If a given river's run is managed based on hatchery production, rather than natural spawners, the run can withstand more intensive harvest in the short term, but because hatchery fish are less genetically diverse and thus more susceptible to disease and other infirmities, over time the quality of hatchery runs will decline.

F. Because the decision of the Court of Appeals is consistent with existing precedent, there is no reason to grant the Petition simply because other Tribes may cite that decision in support of their own claims.

As their final reason for granting their Petition, Petitioners raise the specter of numerous Tribes in the Pacific Northwest and Alaska asserting new claims to allocations of salmon, thus throwing existing allocation schemes into total disarray. There are three obvious responses to this assertion.

First, this Court has no basis (other than Petitioners' notoriously unreliable representations) upon which to determine whether the other cases are even remotely analogous. Second, Petitioners have offered no authority for their contention that claims by Alaskan Native Villages will have any impact upon the Secretary of Commerce's discharge of the duties imposed under the Magnuson Act, and Petitioners have not considered the effect of 43 U.S.C. Sec. 1603 and/or 43 U.S.C. Sec.1618 on any such potential claims.

Third, if the cases mentioned by Petitioners ever produce the chaos that Petitioners predict, this Court undoubtedly will have ample opportunity to review the questions actually presented by those cases. To review the

decision of the Court of Appeals in this case in anticipation of cases that may never arise would be a premature waste of judicial resources.

CONCLUSION

When Congress authorized the President to establish reservations "for Indian purposes" along the Klamath River nearly 150 years ago, salmon were almost as necessary to the survival of Sue Masten's Yurok ancestors and Indians in the region as the very atmosphere they breathed. Much the same can be said today, but for more than half a century, Yuroks and other Indians of the Reservations along the Klamath River have been economically, socially and spiritually suffocated by the federal government's failure to protect either the Indians' fishing rights or the resources upon which the meaningful exercise of those rights depends.

The decision of the Court of Appeals gives Ms. Masten and other Tribal members some measure of assurance that at long last their rights and needs will be recognized and fairly accommodated. No reason exists in law, logic or justice to disturb the decision of the Court of Appeals that the federally-reserved fishing rights of the Yurok and Hoopa Valley Tribes constitute "any other applicable law" that the Secretary of Commerce must

consider in managing the ocean harvest of salmon off the coast of northern California. Accordingly, the Petition should be denied.

DATED this 21st day of April, 1996.

Respectfully submitted:

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APPENDIX

25 U.S.C. Sec. 1300i. Short title and definitions

(a) Short title

This subchapter may be cited as the "Hoopa-Yurok Settlement Act".

(b) Definitions

For the purposes of this subchapter, the term--

(1) "Escrow funds" means the moneys derived from the joint reservation which are held in trust by the Secretary in the accounts entitled--

(A) "Proceeds of Labor-Hoopa Valley Indians-California 70 percent Fund, account number J52-561-7197";

(B) "Proceeds of Labor-Hoopa Valley Indians-California 30 percent Fund, account number J52-561-7236";

(C) "Proceeds of Klamath River Reservation, California, account number J52-562-7056";

(D) "Proceeds of Labor-Yurok Indians of Lower Klamath River, California, account number J52-562-7153";

(E) "Proceeds of Labor-Yurok Indians of Upper Klamath River, California, account number J52-562-7154";

(F) "Proceeds of Labor-Hoopa Reservation for Hoopa Valley and Yurok Tribes, account number J52-575-7256"; and

(G) "Klamath River Fisheries, account number 5628000001";

(2) "Hoopa Indian blood" means that degree of ancestry derived from an Indian of the Hunstang, Hupa, Miskut, Redwood, Saiaz, Sermalton, Tish-Tang-Atan,

South Fork, or Grouse Creek Bands of Indians;

(3) "Hoopa Valley Reservation" means the reservation described in section 1300i-1(b) of this title;

(4) "Hoopa Valley Tribe" means the Hoopa Valley Tribe, organized under the constitution and amendments approved by the Secretary on November 20, 1933, September 4, 1952, August 9, 1963, and August 18, 1972;

(5) "Indian of the Reservation" shall mean any person who meets the criteria to qualify as an Indian of the Reservation as established by the United States Court of Claims in its March 31, 1982, May 17, 1987, and March 1, 1988, decisions in the case of Jesse Short et al. v. United States, (Cl. Ct. No. 102-63);

(6) "Joint reservation" means the area of land defined as the Hoopa Valley Reservation in section 1300i-1(b) of this title and the Yurok Reservation in section 1300i-1(C) of this title.

(7) "Karuk Tribe" means the Karuk Tribe of California, organized under its constitution on April 6, 1985;

(8) "Secretary" means the Secretary of the Interior;

(9) "Settlement Fund" means the Hoopa-Yurok Settlement Fund established pursuant to section 1300i-3 of this title;

(10) "Settlement Roll" means the final roll prepared and published in the Federal Register by the Secretary pursuant to section 1300i-4 of this title;

(11) "Short cases" means the cases entitled Jesse Short et al. v. United States, (Cl. Ct. No. 102-63); Charlene Ackley v. United States, (Cl. Ct. No. 460-78); Bret Aanstadt v. United States, (Cl. Ct. No. 146-85L); and Norman Giffen v. United States, (Cl. Ct. No. 746-85L);

(12) "Short plaintiffs" means named plaintiffs in the Short cases;

(13) "trust land" means an interest in land the title to which is held in trust by the United States for an Indian or Indian tribe, or by an Indian or Indian tribe subject to a restriction by the United States against alienation;

(14) "unallotted trust land, property, resources or rights" means those lands, property, resources, or rights reserved for Indian purposes which have not been allotted to individuals under an allotment Act;

(15) "Yurok Reservation" means the reservation described in section 1300i-1(C) of this title; and

(16) "Yurok Tribe" means the Indian tribe which is recognized and authorized to be organized pursuant to section 1300i-8 of this title.

102 STAT. 2935, PUBLIC LAW 100-580 -- OCT. 31, 1988, 16 U.S.C. Sec. 460ss-3:

SEC. 12. KLAMATH RIVER BASIN FISHERIES TASK FORCE.

(a) IN GENERAL.--Section 4(C) of the Act entitled "An Act to provide for the restoration of the fishery resources in the Klamath River Basin, and for other purposes" (16 U.S.C. 460ss-3) is amended--

(A) in the matter preceding paragraph (1), by striking out "12" and inserting in lieu thereof "14"; and

(B) by inserting at the end thereof the following new paragraphs:

"(11) A representative of the Karuk Tribe, who shall be appointed by the governing body of the Tribe,

"(12) A representative of the Yurok Tribe, who shall be appointed by the secretary until such time as the Yurok Tribe is organized upon which time the Yurok Tribe shall appoint such representative beginning with he first appointment ordinarily occurring after the Yurok Tribe is organized".

(b) SPECIAL RULE.--The initial term of the representative appointed pursuant to section 4(C) (11) and (12) of such Act (as added by the amendment made by subsection (a)) shall be for that time which is the remainder of the terms of the members of the Task Force then serving.

Thereafter, the term of such representatives shall be as provided in section 4(e) of such Act.

Supreme Court, U.S.
FILED
MAY 22 1996
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No. 95-1311

In the Supreme Court of the United States

OCTOBER TERM, 1995

PIETRO PARRAVANO, ET AL., PETITIONERS

v.

BRUCE BABBITT, SECRETARY OF THE INTERIOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Yurok and Hoopa Valley Tribes have federally protected fishing rights that the Secretary of Commerce must take into account as "other applicable law" under the Magnuson Act, 16 U.S.C. 1854(a)(1), in setting harvest levels for Klamath River salmon.

2. Whether petitioners' claims under the Klamath River Basin Fishery Resources Restoration Act, 16 U.S.C. 460ss *et seq.*, and the Trinity River Basin Act, Pub. L. No. 98-541, 98 Stat. 2721, were properly dismissed on the ground that petitioners failed to allege that they had been adversely affected by specific agency action or inaction, as required by 5 U.S.C. 702.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-18) is reported at 70 F.3d 539. The second opinion of the district court (Pet. App. 19-57) is reported at 861 F. Supp. 914. The first opinion of the district court (Pet. App. 58-86) is reported at 837 F. Supp. 1034.

JURISDICTION

The judgment of the court of appeals was entered on November 16, 1995. The petition for a writ of certiorari was filed on February 14, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. The Yurok and Hoopa Valley Tribes live on reservations that trace their origins to congressionally authorized Executive Orders. In the Act of

March 3, 1853, Congress gave the President authority to "make * * * reservations * * * in the State of California * * * for Indian purposes." Ch. 104, § 1, 10 Stat. 238. Acting under that authority, President Pierce issued an Executive Order in 1855 establishing the Klamath River Reservation. Pet. App. 25. The lands within that reservation were occupied by mostly Yurok Indians. *Ibid.*

In the Act of April 8, 1864, Congress authorized the President to set apart up to four tracts of land in California "for the purposes of Indian reservations." Ch. 49, § 2, 13 Stat. 40. Pursuant to that authority, the Superintendent of Indian Affairs for California established the Hoopa Valley Reservation, which was occupied mostly by Hoopa Indians. Pet. App. 25-26. In 1876, President Grant formally set aside the Hoopa Valley Reservation by Executive Order. *Id.* at 26. In 1891, President Harrison issued an Executive Order extending the Hoopa Valley Reservation so that it encompassed the Hoopa Valley Reservation, the Klamath River Reservation, and the 20-mile strip connecting them. *Ibid.*

The Hoopa-Yurok Settlement Act of 1988, Pub. L. No 100-580, 102 Stat. 2924, 25 U.S.C. 1300i *et seq.*, partitioned the extended reservation into the Hoopa Valley and Yurok Reservations. 25 U.S.C. 1300i-1(b) and (c). The Reservations remain partitioned in accordance with the Settlement Act.

The Yurok and Hoopa Valley Tribes historically have been dependent on salmon fishing, and the reservations were located to include the Klamath River Basin salmon fishery. Pet. App. 27; see also *Donnelly* v. *United States*, 228 U.S. 243, 259 (1913). The Tribes' reliance on salmon fishing continues to this day. Pet. App. 28.

b. The Magnuson Fishery Conservation and Management Act (Magnuson Act), 16 U.S.C. 1801 *et seq.*, was enacted to conserve ocean fishing resources. 16 U.S.C. 1801(b). The Act gives the Department of Commerce authority to regulate ocean fishing between three nautical miles and two hundred nautical miles offshore. The Act also establishes Fishery Management Councils, which have the authority to recommend ocean harvest limits (the number of fish that may be caught) and spawning escapement levels (the number of fish that are allowed to escape so that they can spawn). 16 U.S.C. 1852. The Secretary of Commerce reviews council recommendations for consistency with the standards set forth in the Magnuson Act and "other applicable law." 16 U.S.C. 1854(a)(1)(B). Based on that review, the Secretary may either approve or disapprove the council's recommendations. 16 U.S.C. 1854. When necessary, the Secretary may issue emergency regulations. 16 U.S.C. 1855(c)(1).

c. The Klamath River chinook is an anadromous species of salmon. Pet. App. 20. They hatch in the Klamath River and its tributaries, migrate downstream to the ocean, and then return to their fresh water origins to spawn and die. *Ibid.* The harvesting of chinook is subject to three regulatory regimes. The Secretary of the Interior has authority over the Yurok and Hoopa Valley Tribes' on-reservation fishing. The State of California has authority over non-Indian river fishing and fishing in coastal waters from the shore to three miles off-shore. The Secretary of Commerce has authority under the Magnuson Act beyond the three mile limit.

d. The Pacific Fishery Management Council (Pacific Council) has responsibility under the Magnuson

Act to recommend harvest and escapement levels for the Klamath River chinook. Pet. App. 64-65. Prior to 1993, the Pacific Council's management had not proven adequate to achieve the necessary escapement. *Id.* at 69. As a consequence, the Department of the Interior's Bureau of Indian Affairs had severely curtailed Indian salmon harvesting in the Klamath River. *Ibid.*

In March 1993, the Secretary of the Interior informed the Secretary of Commerce of his view that, pending guidance from the Interior Solicitor, the Tribes should receive a 50% share of the total Klamath River chinook harvest and that ocean harvesting of the chinook should be regulated under the Magnuson Act so that a sufficient number of fish could reach the River for spawning and tribal harvest. Pet. App. 7. The Solicitor of the Department of the Interior subsequently issued an opinion concluding that the Tribes have a federal right to a share of the fishery resources of up to 50% in order to support their moderate living needs. *Id.* at 29. The Secretary of Commerce then issued an interpretive regulation stating that he would treat the Tribe's fishing rights, as determined in the Solicitor's opinion, as "other applicable law" within the meaning of the Magnuson Act, and that he would therefore approve recommendations for harvest levels only if they were consistent with the Solicitor's opinion. *Ibid.*

In April 1993, the Pacific Council recommended a 22% ocean harvest rate, with a spawning escapement floor of 35,000. Pet. App. 7, 70-71. That recommendation assumed a 32.5%, rather than a 50%, Indian in-river harvest share. *Id.* at 70-71. The Secretary of Commerce disapproved the council's recommendation and reached an agreement with the Secretary of the

Interior concerning the appropriate course of action for the 1993 season. *Id.* at 71. The Secretary of the Interior agreed to limit the Tribes to a 44.6% share, and the Secretary of Commerce agreed to limit the ocean harvest rate to 14.5% and increase the escapement floor to 38,000. *Ibid.* The Secretary of Commerce then issued an emergency regulation incorporating the 14.5% harvest rate and the 38,000 escapement floor. *Id.* at 66.

2. Petitioners, who are commercial fishermen and commercial fishing associations, filed suit alleging that the Secretary of Commerce improperly reduced the harvest levels for the 1993 season in violation of the Magnuson Act. In particular, they claimed that the Tribes do not have federally reserved fishing rights and that the Secretary therefore did not have the authority to limit ocean harvest levels in order to protect such rights. They also alleged that the Secretary of the Interior had violated the Klamath River Basin Fishery Resources Restoration Act, 16 U.S.C. 460ss *et seq.*, and the Trinity River Basin Act, Pub. L. No. 98-541, 98 Stat. 2721, by failing to restore Klamath River runs. Pet. App. 1-2.

The district court rejected petitioners' claims. Pet. App. 19-57. The court held that the United States had reserved Indian fishing rights when it established what are today the Yurok and Hoopa Valley Reservations. It reasoned that a fishing right could be reserved by congressionally authorized Executive Order as well as by treaty and that the Executive Orders establishing the Yurok and Hoopa Valley Reservations had reserved such a right. *Id.* at 32-36. The court further held that, for the Tribes federally-reserved right to have meaning, off-reservation fishing must be limited to the extent necessary

to preserve that right. *Id.* at 36-40. The court therefore concluded that the Secretary of Commerce did not violate the Magnuson Act when he took into account the Tribes' fishing rights as "applicable law" in setting ocean harvest levels. *Id.* at 40-42.

The district court also held that petitioners' claims that the Secretary of the Interior had violated the Klamath Basin Act and the Trinity Basin Act were not subject to judicial review. Pet. App. 52-56. The court concluded that petitioners' claims were not subject to review under the Administrative Procedure Act, 5 U.S.C. 702, because petitioners had failed to identify any specific agency action that adversely affected them. Pet. App. 52-54. The court also concluded that neither the Klamath Basin Act nor the Trinity Basin Act created implied rights of action. *Id.* at 54-56.

3. The court of appeals affirmed, Pet. App. 1-18, expressly adopting the reasoning of the district court, *id.* at 3. The court went on to emphasize that fishing rights created by congressionally authorized Executive Orders have the same status as fishing rights reserved by treaty. *Id.* at 10-15. The court also stressed that the United States has a duty to protect the Tribe's on-reservation fishing rights by preventing the overharvesting of fish while they are still in the ocean. *Id.* at 16-17.

ARGUMENT

1. Petitioners contend (Pet. 17-19) that the Yurok and the Hoopa Valley Tribes do not have fishing rights that are protected by federal law because their reservations were established by Executive Orders that do not specifically mention fishing rights. That

contention is without merit and does not warrant this Court's review.

a. Under this Court's decision in *Menominee Tribe* v. *United States*, 391 U.S. 404, 405-406 (1968), when a reservation is established for Indian purposes, a right to hunt and fish on the reservation is reserved by implication. The existence of such an implied right is particularly clear when the site for the reservation is chosen because of its suitability for hunting and fishing. *Id.* at 406.

The court of appeals correctly concluded that, under the analysis set forth in *Menominee Tribe*, the Yurok and Hoopa Valley Tribes have a right to fish on their reservations. Congress expressly authorized the President to set aside reservations in California "for Indian purposes," and the Yurok and Hoopa Valley Reservations were established by Executive Orders pursuant to that statutory authority. Moreover, the Klamath River site for the reservations was chosen precisely because the river "abounded in salmon and other fish." *Mattz* v. *Arnett*, 412 U.S. 481, 487 (1973). In those circumstances, the establishment of what are today the Yurok and Hoopa Valley Reservations created a reserved right on the part of the Indians to fish on those reservations.

Menominee involved a reservation created by treaty, rather than by statutorily authorized Executive Order. But reserved rights are also created when a reservation is established by Executive Order. *Arizona* v. *California*, 373 U.S. 546, 598 (1963). In *Arizona* v. *California*, the Court squarely rejected the argument that implied rights could be created only by treaty, stating that "[w]e can give but short shrift at this late date to the argument that the reservations either of land or water are invalid

because they were originally set apart by the Executive." *Ibid.* Just as it must be assumed that the United States intended to deal fairly with the Indians when it established a reservation by treaty, so it must be assumed that the United States intended to deal fairly with the Indians when it established a reservation by Executive Order. *Id.* at 600.

Consistent with that understanding, the federal and state courts that have considered the issue have uniformly held that the Yurok and Hoopa Valley Tribes have a federally protected right to take fish from the Klamath River. *United States* v. *Eberhardt*, 789 F.2d 1354, 1359-1360 (9th Cir. 1986); *People* v. *McCovey*, 685 P.2d 687, 697 (Cal.), cert. denied, 469 U.S. 1062 (1984); *Mattz* v. *Superior Court*, 758 P.2d 606 (Cal. 1988), cert. denied, 489 U.S. 1078 (1989); *Arnett* v. *Five Gill Nets*, 121 Cal. Rptr. 906, 911 (1975), cert. denied, 425 U.S. 907 (1976); *Donahue* v. *California District Court*, 93 Cal. Rptr. 310, 313, cert. denied, 404 U.S. 990 (1971).

b. Because the Tribes have a right to harvest fish on their reservations, the Secretary of Commerce had the responsibility to limit the ocean harvesting of such fish to the extent necessary to protect that right. As the court of appeals explained, "allowing ocean fishing to take all the chinook available for harvest before the salmon can migrate upstream to the Tribes' waters would offer no protection to the Indians' fishing rights." Pet. App. 16.

In reaching the conclusion that the Secretary could regulate ocean fishing in order to protect the Tribes' right to fish on their Reservations, the court of appeals correctly relied on this Court's decisions involving implied water rights. In that context, the Court has held that, in order to protect a Tribe's on-

reservation water rights, steps may be taken to limit off-reservation water use. *Arizona* v. *California*, 373 U.S. at 596-600; *Winters* v. *United States*, 207 U.S. 564, 576 (1908). Because the Tribes' right to fish in this case, like the right to water, is "essential to the life of the Indian people," *Arizona* v. *California*, 373 U.S. at 599, the principle involved in the water rights cases is equally applicable here. See also *Washington* v. *Washington State Commercial Passenger Fishing Vessel Assoc.*, 443 U.S. 658, 684 (1979) (citing *Arizona* v. *California* for the proposition that rights implicitly secured in the establishment of a reservation may be enforced by a fair apportionment of the resource in question between Indians and non-Indians).[1]

c. Petitioners contend (Pet. 15, 19-20) that the decision below "conflicts in principle" with *Shoshone-Bannock Tribes* v. *Reno*, 56 F.3d 1476 (D.C. Cir. 1995), and *Crow Tribe* v. *Repsis*, 73 F.3d 982 (10th Cir. 1995), petition for cert. pending, No. 95-9560 (filed Mar. 25, 1996). There is, however, no such conflict. In the cases cited by petitioners, the relevant treaties gave the Tribes an off-reservation right to "hunt on the unoccupied lands of the United States so long as game may be found thereon, and so long as peace subsists among the whites and Indians on the borders of the

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[1] Petitioners' apparent view (Pet. 17-18) that the Secretary of Commerce lacks power to protect fishing rights created by Executive Order because the Magnuson Act specifically requires an ocean management plan to describe "the nature and extent of * * * Indian treaty fishing rights, if any," 16 U.S.C. 1853(a)(2), is without merit. Section 1853(a)(2) refers to Indian treaty fishing rights in *ocean* areas, not to *in-river* fishing rights. Whether protected by treaty, statute, or Executive Order, in-river fishing rights must be taken into account as "other applicable law" under 16 U.S.C. 1853(a)(1)(C).

hunting districts." *Shoshone-Bannock Tribes*, 56 F.3d at 1478; *Crow Tribe*, 73 F.3d at 987. In *Shoshone-Bannock*, the D.C. Circuit held that the pertinent treaty language did not require the Attorney General to file a claim on the Tribe's behalf for water rights to support contingent hunting rights on off-reservation unoccupied lands of the United States. 56 F.3d at 1480-1484. In *Crow Tribe*, 73 F.3d at 987-989, the Tenth Circuit held that the pertinent treaty language granted a temporary right to hunt and fish off the reservation that ended when Wyoming was admitted to the Union. Thus, the cases relied upon by petitioners concern the scope of *off-reservation* rights. In contrast, this case concerns the scope of *on-reservation* rights. The decisions cited by petitioners are therefore inapposite here. *People* v. *McCovey*, 685 P.2d at 697.[2]

d. Petitioners' remaining contentions are also unpersuasive. Petitioners assert (Pet. 22-25) that the Secretary of Commerce's decision in this case conflicts with prior administrative interpretations of the Magnuson Act. Even before this case arose, however, the fishery management plan for ocean harvest that affects the Klamath River area had required the Pacific Council to account for the "requirements of the Indian fishery for salmon on the Klamath River." Pet. App. 66. More generally, the federal government has long recognized the Indian fishing rights involved in this case, even though

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[2] Because this case involves an on-reservation right to fish, petitioners' reliance on the equal footing doctrine (Pet. 21) is especially misplaced. This Court held in *Arizona* v. *California*, 373 U.S. at 597-598, that the equal footing doctrine does not preclude the United States from reserving rights "for its reservations and its property."

coordination of management measures between the Departments of Commerce and the Interior before 1993 was sometimes lacking. *Eberhardt*, 789 F.2d at 1363-1364 (Beezer, J., concurring).

Petitioners also challenge (Pet. 21-22) the court of appeals' statement that Executive Orders should be interpreted as the Indians would have understood them. But while the court stated that "Executive Orders, no less than treaties, must be interpreted as the Indians would have understood them and any doubtful expression in them should be resolved in the Indians' favor," Pet. App. 9, it applied only the latter part of that interpretive principle in this case, *id.* at 14. The court of appeals specifically held that "fishing rights arise by implication when a reservation is set aside for Indian purposes," *id.* at 13, rejecting petitioners' "novel theory that ambiguity in the phrase 'for Indian purposes' should be resolved against the Tribes," *id.* at 14. For the reasons discussed above, that holding is consistent with this Court's decisions.

Finally, petitioners express concern (Pet. 27-28) that the decision below will create fishing rights for numerous other Tribes. The decision below, however, applied well established principles to the particular circumstances involved in the establishment of the reservations at issue here. That decision does not create a broad ruling applicable to all Tribes, regardless of their circumstances. The cases cited by petitioners (Pet. 27) do not suggest otherwise. In those cases, the Tribes have argued that the decision below supports their right to fish off-reservation. But the Ninth Circuit has not ruled on that question, and nothing in the decision in this case purports to resolve it.

2. Petitioners also present the question whether fishermen may enforce the mandate in the Klamath River Basin Fishery Resources Restoration Act, 16 U.S.C. 460ss *et seq.*, that the Secretary of the Interior "shall formulate, establish and implement a 20-year program to restore" Klamath River salmon. Pet. i. Because petitioners fail to include any argument addressed to that question in the body of their petition, however, that question is not properly presented.

In any event, the district court correctly dismissed petitioners' claim under the Klamath Restoration Act (as well as a similar claim under the Trinity Basin Act), because petitioners failed to allege that they had been adversely affected or aggrieved by any specific agency action or inaction. See *Lujan* v. *National Wildlife Federation*, 497 U.S. 871, 882 (1990). Petitioners' general allegation that the Secretary of the Interior has failed to implement measures to improve the Klamath River runs (Pet. App. 53) is insufficient to justify review under *Lujan*.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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